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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 627

GEORGE P. PORTER, AUDITOR AND EX-OFFICIO INVESTMENT COMMISSIONER OF THE STATE OF MONTANA, APPELLANT,

vs.

INVESTORS SYNDICATE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

FILED JANUARY 11, 1932

(36,441)

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IN UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA (HELENA DIVISION)

In Equity. No. 1190

INVESTORS SYNDICATE, a Corporation, Plaintiff,

vs.

GEORGE P. PORTER, Auditor and Ex Officio Investment Commissioner of the State of Montana, Defendant

BILL OF COMPLAINT—Filed June 24, 1931.

The plaintiff, Investors Syndicate, a corporation, brings this, its bill of complaint, against the above named defendant, and for cause of action alleges:

I

That plaintiff is, and has been for many years, a corporation, duly organized and existing under and by virtue of the laws of the State of Minnesota, with its principal office and place of business in the City of Minneapolis, in said state, and is a citizen of the State of Minnesota.

That defendant, George P. Porter, is and has been since prior to the year 1930, the duly elected, qualified and acting Auditor of the State of Montana, and Ex Officio Investment Commissioner of said State and a citizen thereof.

II

That this is a suit of a civil nature, and the matter in controversy exceeds, exclusive of interest and costs, the [fol. 3] sum of value of Three Thousand ($3,000.00) Dollars, as will appear from the further allegations hereof, and is wholly between citizens of different states, to-wit, plaintiff, a corporation and citizen of the State of Minnesota, and defendant a citizen of the State of Montana.

That this is also a suit arising under the Constitution of the United States, as will appear from the allegations following.

III

That plaintiff was organized and incorporated under the laws of Minnesota on the 29th day of June, 1894, to engage in the business of issuing and selling certain investment certificates in said state and elsewhere, and ever since has been so engaged; that it has engaged in the sale of said certificates to the general public in the State of Montana continuously since the month of January, 1930; that by the said certificates so issued and sold plaintiff agrees therein, that in consideration of the payment by the purchaser and holder of either one sum or of installments over a period of years, to pay to the holder at the expiration of the period stated therein a certain definite sum of money, in accordance with the terms and provisions set forth therein, all of which fully appear from copies of such certificates hereto attached and marked Exhibits "A" and "B" respectively, and made a part hereof.

IV

That plaintiff is now, and, at all times herein mentioned, has been a foreign investment company, within the provisions of Sections 4026 to 4055 inclusive of the Revised Codes of Montana of 1921, as amended, commonly known and referred to as the Blue Sky Law of Montana.

V

That on the 8th day of January, 1930, the defendant, as Investment Commissioner of the State of Montana, pursuant to the terms and provisions of said Blue Sky Law, issued to plaintiff a permit and statement reciting that [fol. 4] plaintiff had complied with the provisions of said law; that detailed information regarding plaintiff and its certficates offered by it for sale was on file in his office for public inspection and information, and that plaintiff was permitted to do business in the State of Montana, under the provisions of said law; that said permit has never been forfeited or revoked and still remains in full force and effect; a copy of said permit so issued is hereto attached, marked Exhibit "C" and made a part hereof.

VI

That plaintiff filed an annual statement for the year 1930, as required by Section 4041 Revised Codes of Montana of

1921, showing its financial condition, amount of its properties and liabilities, and all information concerning its affairs required by said Investment Commissioner, and it appearing from such statement that the assets of this plaintiff exceeded the sum of Five Million ($5,000,000.00) Dollars, plaintiff paid to the said Investment Commissioner, prior to the first day of July, 1930, a fee of Five Hundred ($500.00) Dollars, as provided in Section 4050 of the Revised Codes of Montana of 1921, as amended by Section 5 of Chapter 179 of the Laws of Montana of 1929.

VII

That on the 22nd day of June, 1931, the defendant, as such Investment Commissioner, made and issued a rule or order addressed to this plaintiff, and other investment companies doing business in the State of Montana, a copy of which is as follows:

"It is therefore ordered that from and after the 22nd day of July, 1931, the following rule shall be in full force and effect:

"In the interests of the investing public, any investment company operating in the State of Montana shall not issue, sell, or distribute, any bonds, certificate of indebtedness, collateral trust certificates or any other device whatsoever, that might be deemed a security creating a debtor-creditor relationship, which has a withdrawal privilege, before maturity, that does not provide for withdrawal of installments paid thereon due any time after the first year, if the owner or holder shall have given ninety (90) days notice in writing of his intention to make such withdrawal and such owner or holder shall be entitled to receive the [fol. 5] total amount of all installments paid in, less only a withdrawal penalty not exceeding three and one-half (3½) per cent of the matured or face value of such securities, plus interest compounded annually, at the rate at which said securities are guaranteed to mature or represented to pay at maturity; and provided further, that the bond or contract representing such security and the application for the same shall have printed thereon, the amount paid in, the withdrawal or surrender value thereof, and the loan value at the end of each year of its duration.

It is further provided that none of the above securities as enumerated shall be permitted to be sold in the State of Montana unless there is a wtihdrawal privilege provided each year beginning with the first year until maturity.

Dated at Helena, Montana, this 22nd day of June, 1931.

Geo. P. Porter, State Auditor and ex Officio Investment Commissioner."

That the said Investment Commissioner, in making and issuing said order, assumed to act under and exercise authority conferred by the Blue Sky Law of Montana, as will appear from what are designated by him "Findings", delivered to and served upon this plaintiff, with said order, a copy of which are as follows:

Findings

1. The Commissioner maintains that Section 4043 of the Revised Codes of Montana, 1921, confers authority for the promulgation of the proposed rule in the following language:

"• • • The Investment Commissioner shall have general supervision and control, as provided by this act, over any and all investment companies and stock brokers, domestic or foreign, licensed under this act."

2. The Commissioner believes that the provisions of Section 4036, Revised Codes of Montana, 1921, providing in part:

"• • • Such permit, however, shall be subject to revocation at any time by the Investment Commissioner for cause to him sufficient."

clearly gives the Commissioner authority to cancel permits.

3. That the above mentioned provision of law impliedly gives to the Commissioner the right to impose a lesser penalty, namely, the removal of all unfair provisions in [fol. 6] contracts.

4. That Section 4045 of the Revised Codes of Montana, 1921, provides in part as follows:

"Revocation of Permits and Appointment of Receiver.—Whenever, it shall appear to the Investment commissioner that the assets of any investment company doing business

in this state are impaired to the extent that such assets do not equal its liabilities, or that it is conducting its business in an unsafe, unequitable, or unauthorized manner, or is jeopardizing the interests of its stockholders or the investors in stocks, bonds or other securities by it offered for sale, or whenever any investment company shall refuse to file any papers, statements, or documents required under this Act, or shall refuse to permit an examination by said investment Commissioner, or his deputies or agents, as provided in this Act, without giving satisfactory reasons therefor, said investment commissioner shall at once cancel its permit. * * *"

The Commissioner believes that a loading charge of from 5% to 8% is highly inequitable as this term is defined in this section.

5. That it is unreasonable and inequitable to maintain that investment companies who were operating in Montana prior to the enactment of the present investment act should not be amenable to the same reasonable and lawful supervision and control by this Commissioner as exercised on companies coming under his supervision at a larger date.

6. That this Commissioner is continually receiving complaints to the effect that agents of investment companies misrepresent to prospective purchasers either by not stating the provisions relating to withdrawals or by alleging that investors can procure their money at any time.

7. That in justice to the investing public, during the period of depression, they should not be unreasonably penalized for conditions beyond their control, caused by unemployment or depreciation of commodity values.

8. That the proposed rule is a reasonable one as evidenced by its adoption by certain of the investment companies operating in this state and by testimony produced at the hearing.

9. That a maximum withdrawal penalty of 3½% is amply sufficient in case of forfeiture of investment installment contracts and that withdrawals should be permissable at any time after one year."

[fol. 7] VIII

That said Investment Commissioner threatens to and will, unless plaintiff complies with said order, cancel the permit issued to plaintiff, as aforesaid.

IX

That the provision of Section 4036 of the Revised Codes of Montana of 1921, upon which defendant relies as authority for the making and issuing of said order, as appears from said findings, is in violation of, repugnant to, and in conflict with Section 1 of Article 14 of the Amendments to the Constitution of the United States, in that it authorizes said Investment Commissioner to deprive this plaintiff of its property, consisting of said permit and the right to sell said certificates in the State of Montana, and of its liberty of making and entering into the contracts evidenced thereby, without due process of law, and denies to plaintiff the equal protection of the laws.

X

That Section 4045 of the Revised Codes of Montana of 1921, pursuant to which the said defendant assumed the right to determine and find that the said certificates which plaintiff was authorized to sell, and is selling in the State of Montana, are inequitable, is in violation of, repugnant to, and in conflict with the due process of law clause of the 14th Amendment to the Federal Constitution in that it authorizes said Investment Commissioner to deprive plaintiff of its property, consisting of said permit and the right to sell said certificates in the State of Montana, and of its liberty of making and entering into the contracts evidenced thereby, without due process of law and denies to plaintiff the equal protection of the laws.

XI

That the aforesaid rule or order is arbitrary, unreasonable and illegal, and in violation of and in conflict with the due process of law clause of the said 14th Amendment in that it will deprive plaintiff of its property, consisting of said permit and the right to sell said certificates in the State [fol. 8] of Montana, and of its liberty of making and enter-

into the contracts evidenced thereby without due process aw and denies to plaintiff the equal protection of the s.

XII

hat plaintiff has sold and is now engaged in selling its ificates in 35 states and in 8 of the provinces of Canada; the terms and provisions of its certificates which it has and is now selling in said other states and provinces the same as exhibits "A" and "B" hereto; that to com- with said order as to the terms and conditions of its ificates hereafter offered for sale and sold in the State Montana, would result in unjust and unfair discrimina- between the purchasers and holders of said certificates the holders of certificates heretofore sold in the State Montana and elsewhere; that the necessary result of rule and order, and the enforcement thereof, would be ompel plaintiff to withdraw from and discontinue the of the certificates in the State of Montana and to de- e plaintiff of its right to sell such certificates in said e, the value of which right is largely in excess of 0.00, and plaintiff would thereby suffer irreparable in- , damage and loss.

hat in the year 1930, the plaintiff sold in the State of tana certificates of the maturity value of $2,141,200.00, that there are approximately 4500 holders of such ificates in the State of Montana.

XIII

hat plaintiff's method of selling said certificates and the way in which the same can be sold at a profit is by ns of agents and plaintiff now has over 20 agents or smen in said state, all of whom have been duly licensed ell said certificates, by said defendant as Investment missioner. That if said order becomes effective and permit is cancelled, such agents will, of course, refuse ell said certificates in fear of criminal prosecution and usiness of this plaintiff in the State of Montana will be upted and destroyed to its great and irreparable injury damage, even though it should finally be determined said order was made without authority and is wholly lid.

[fol. 9] XIV

That the penalties provided by Section 4049 of the Revised Codes of Montana of 1921, for a violation of the provisions of said Blue Sky Law, are so large and severe that unless the enforcement of said order is enjoined, plaintiff would be compelled to obey said order or cease selling its certificates in the State of Montana, notwithstanding it is convinced that said order will be ultimately adjudged and decreed to be unlawful, by reason whereof said Section 4049 is in conflict with, repugnant to and violative of the due process of law clause of the said 14th Amendment and denies to plaintiff the equal protection of the law in violation of said amendment.

XV

That the cancellation or attempted cancellation of said permit would cause the public and investors generally to believe that plaintiff's certificates are unsound and unsafe and that the sale and purchase thereof are prohibited by the laws of said state and would greatly retard, if not wholly prevent, the sale of said certificates in Montana, to the great irreparable injury and damage of plaintiff.

XVI

That copies of said certificates were presented to and filed with said Investment Commissioner prior to issuance of such permit and said Commissioner found that such proposed contracts contain and provide for a fair, just, and equitable plan for the transaction of business and promise a fair return, which finding was in accord with the terms and provisions of such certificates.

XVII

That plaintiff has no plain, speedy or adequate remedy in the ordinary course of the law.

Wherefore plaintiff prays:

1. That it be adjudged and decreed that said order is illegal and void.

[fol. 10] 2. That a writ of preliminary or interlocutory injunction, effective during the pendency of this suit, issue,

directed to said defendant, enjoining and restraining him from revoking or purporting to revoke or attempting to revoke plaintiff's permit, because of the failure of plaintiff to comply with said order, and also from instituting, causing, aiding, or encouraging institution, prosecution or maintenance of any action, criminal or otherwise, against plaintiff or any of its officers, agents and employees, or any other person, for or on account of the failure of plaintiff to comply with said order.

3. That a temporary restraining order issue, enjoining and restraining the defendant as aforesaid, pending the determination of the application herein for an interlocutory injunction.

4. That upon final hearing, such injunction be made perpetual.

5. That the plaintiff may have all other proper and equitable relief.

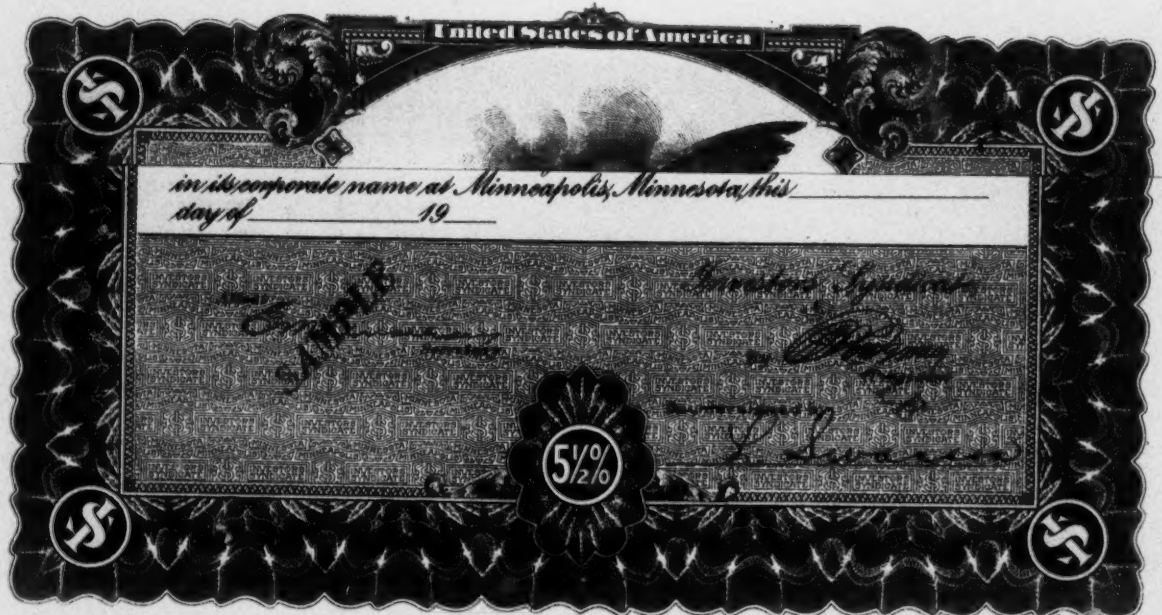
6. That this Honorable Court grant to plaintiff a writ of subpœna, directed to said defendant, commanding him to appear on a day certain and make answer to this complaint, (but not under oath, answer under oath being expressly waived) and to abide the further order of the court.

Dated this 23rd day of June, A. D. 1931.

Investors Syndicate, by M. S. Gunn, Gunn, Rasch, Hall & Gunn, Residents of the City of Helena, State of Montana, Solicitors for Plaintiff. Henry M. Isaacs, of Counsel, Resident of Minneapolis, Minn.

[fol. 11] *Duly sworn to by J. A. Miller. Jurat omitted in printing.*

(Here follows Exhibit "A," installment investment certificate, side folios 12, 13, 14, and 15)



AMERICAN BANK NOTE COMPANY, LITHO.

10A

12

EXHIBIT "A"

FOUNDED 1894

INVESTORS SYNDICATE

INCORPORATED UNDER THE LAWS OF THE STATE OF MINNESOTA

HOME OFFICE
MINNEAPOLIS, MINNESOTA

INSTALLMENT INVESTMENT CERTIFICATE

This is to Certify that in consideration of the payment of Seventy-Four ($74.00) Dollars, annually in advance during the period of ten years from date hereof, the Investors Syndicate, first party, hereinafter referred to as the Company, hereby promises to pay to

_____

of _____ *hereinafter referred to as the second party, at the expiration of said period, upon presentation and surrender of this Certificate to the Company at its office in the City of Minneapolis, Minnesota, the sum of*

ONE THOUSAND DOLLARS.

This Certificate is subject to the privileges, terms and conditions on the second, third and fourth pages hereof which are hereby referred to and made a part hereof, as fully as if set forth in the face of this Certificate.

SPECIAL SETTLEMENT OPTION

The owner of this Certificate by written notice delivered to the Company at its Home Office, accompanied by the Certificate for endorsement, with right of revocation, may elect to receive in lieu of the face amount in one sum when this Certificate matures a monthly income of

SIX AND 66/100 — — — — — — — — — — — — — — Dollars

until one hundred twenty such monthly payments have been made and at the end of the monthly payment period a further payment in one sum equal to one-half the face amount of this Certificate, or

FIVE HUNDRED AND NO/100 — — — — — — — — Dollars.

IN WITNESS WHEREOF, the Company has caused this Certificate to be executed in its corporate name at Minneapolis, Minnesota, this _____ *day of* _____ *19*____

5½%

10A

PRIVILEGES AND CONDITIONS

1. SECURITY. The Company agrees to keep and maintain at all times first mortgages or first deeds of trust on improved real estate, cash, government and municipal bonds and other securities that qualify for investments of life insurance companies under the laws of the state of New York, in an amount equal to $110 for each $100 of its liability hereunder and under all other like outstanding certificates issued by it, said liability being the optional settlement amounts as shown in Paragraph 11 less the amount of any loans made hereon.

2. PAYMENTS. This Certificate is payable annually in advance, but the second party shall have the right to meet any current year's requirements by monthly payments of $6.50, quarterly payments of $19.30 or semi-annual payments of $38.40 on each $1,000 of the maturity amount of this Certificate. The second party shall have the right at any time to change from one method of payment to another.

3. ADVANCE PAYMENTS. Any payment made in excess of the current year's requirements shall be deemed an advance payment and shall bear interest at the rate of 5½% compounded annually, and shall increase by such amount plus the interest credited thereon, the optional settlement rights. Such advance payments shall be applied on annual payments when they become due. Whenever the advance payments with interest and the installments with interest shall equal the maturity amount hereof, then the Company will pay interest annually in cash at 5½% per annum to the second party, his heirs or assigns, until maturity.

4. NON-FORFEITURE PROVISIONS.

(A) In the event payments are not made when due, this Certificate may be reinstated at any time by resuming monthly or other specified payments if default has continued for less than two years, but no interest will be allowed hereon during the period of default, and in the event of such resumption of payments the maturity hereof and the due date of remaining payments shall be extended for a period equal to the time default continued, time being the essence hereof.

(B) In the event the second party discontinues payments hereon for a period of two years the rights of the second party are not thereby forfeited but the second party shall have the following options:

1. Receive the sums payable under optional settlement rights stated in Paragraph 11.

2. Receive a Paid Up Certificate in accordance with Paragraph 6.

3. In the event this Certificate has not attained optional settlement rights as stated in Paragraph 11, receive with credit in full for all payments made hereon, a new installment certificate of the kind and at the rate then being issued, upon written request and the surrender of this Certificate and upon resumption of payments and the payment of $1.00 reissuance charge; provided no credits shall be deemed advance payments, and this right shall continue so long as the Company is engaged in issuing like certificates.

Should the second party fail to exercise any one of the above options the Company may at any time after said two year default, issue a Paid Up Certificate which shall thereupon supersede this Certificate. In the event of a default for more than two years, where no optional settlement rights under Paragraph 11 have accrued, then, except as to the right to receive a new certificate under option 3 herein with sums credited thereon, the rights of the second party shall cease and determine.

(C) REINSTATEMENT RIGHTS. In the event the second party shall reinstate this Certificate after default by resuming payments and shall thereafter make up such defaulted payments and apply for the maturity or optional settlement value, he shall be entitled to receive the then present worth of such maturity or optional settlement value under Paragraph 11, for the time paid for computed at 7% per annum for the period from date such optional settlement or maturity value is paid, to the extended due date.

5. OPTIONAL SETTLEMENTS IN THE EVENT OF DEATH OR DISABILITY. In the event of total and permanent disability as herein defined, or in the event of death, the second party, or his legal representatives, may elect (a) to continue this Certificate by making payments thereon, or (b) surrender the same and accept the full amount paid hereon with interest at the rate of 4% per annum compounded annually computed on sums from dates paid to date of total disability or death, as the case may be, subject to the ninety day notice provided in Paragraph 8. Total disability shall mean that the second party, as a result of sickness or injury, has become totally and permanently disabled while a holder of this Certificate and before he attains the age of sixty years and has become unable to engage in any gainful occupation for the balance of his life. No sums will be payable until the Company has received legal proof of death or permanent total disability required by it. If this Certificate is issued other than to one individual, the provisions of this paragraph shall not apply except when issued in the name of one person for a minor, in which event the second option (b) herein shall apply only in the event of the death or permanent total disability of the first person, but the proceeds shall belong to the minor.

6. PAID UP CERTIFICATE. If this Certificate has been in force for any of the periods shown in the following schedule, exclusive of any period or periods of default, the second party upon written request shall have the right to surrender this Certificate and receive a Paid Up Certificate for the following amounts per thousand of maturity amount of this Certificate, due and payable in one sum ten years from date request is received:

18 mos.	2 yrs.	3 yrs.	4 yrs.	5 yrs.	6 yrs.	7 yrs.	8 yrs.	9 yrs.
$118	$156	$283	$434	$632	$799	$990	$1202	$1418

7. ASSIGNMENT. This Certificate if in force and uncancelled on the books of the Company may be assigned, but the assignment or transfer hereof shall not be valid without the consent in writing endorsed hereon by the Company and a transfer fee of $1.00 paid to the Company; provided that in case of assignment the permanent total disability benefits shall apply only if such permanent total disability occurs to the assignee wholly after the assignment is endorsed by the Company hereon.

8. MISCELLANEOUS. No agent or other person has authority to alter or change the terms of this Certificate or bind the Company by any statement, written or oral, not herein contained. The Company shall have the right at all times to call in this Certificate and cancel the same by paying the second party the full amount paid hereon together with interest at 5½% compounded annually for the time the Company has had the use of the money, less any indebtedness due the Company, and shall have a like right to call in and pay off any certificate issued in lieu hereof or any of the optional settlements herein, by paying the then present worth computed on the basis of 5½% compounded annually, less any loans made thereon. The Company if it so elects may require ninety days written notice as to any loans or optional settlements hereunder except that this requirement shall not apply to the maturity payment of this Certificate nor to any fixed or installment payments after maturity that are elected by the second party at or prior to maturity.

9. CASH IN FULL GUARANTEED AT MATURITY. Anything in this Certificate to the contrary notwithstanding, the second party shall at the time of maturity and upon surrender of this Certificate, be entitled to receive, and the Company guarantees then to pay in cash the face amount hereof less any indebtedness due the Company.

10. CERTIFICATE LOANS. The Company will loan at any time, upon proper assignment of this Certificate as sole security, a sum equal to (or less, at the option of the second party) the optional settlement amounts then payable under Paragraph 11 of this Certificate.

11. OPTIONAL SETTLEMENTS PRIOR TO MATURITY. After this Certificate has been in force for any one of the periods shown in the following schedule, exclusive of any period or periods of default, the second party, upon written request and surrender of this Certificate, may elect to receive in cash, per thousand of maturity amount, the sums shown in the following schedule, less any indebtedness secured by this Certificate:

18 mos.	2 yrs.	3 yrs.	4 yrs.	5 yrs.	6 yrs.	7 yrs.	8 yrs.	9 yrs.	10 yrs.
$42	$84	$166	$254	$370	$468	$580	$704	$830	$1000

12. OPTIONAL SETTLEMENTS AT MATURITY. The second party may elect in lieu of cash when this Certificate matures, any one of the following settlements, by notifying the Company of his election prior to maturity and having such election endorsed by the Company on this Certificate, and the Company agrees to keep and maintain the same class of security as specified in Paragraph 1 in an amount not less than its liability.

OPTION A. The Company agrees to pay interest annually at 5½% per annum thereon, or if interest is allowed to accumulate, all sums will be compounded and interest credited annually. At any time after maturity the second party may request final settlement, and upon request principal and accrued interest to the last interest accrual date will be paid by the Company.

OPTION B. To continue paying under the terms of this Certificate, the annual, semi-annual, quarterly, or monthly payments and receive at the end of any annual period paid for after maturity upon surrender of this Certificate, the following sums per thousand of maturity amount of this Certificate:

1 yr.	2 yrs.	3 yrs.	4 yrs.	5 yrs.	6 yrs.	7 yrs.	8 yrs.	9 yrs.	10 yrs.
$1133	$1273	$1421	$1577	$1742	$1916	$2100	$2293	$2497	$2713

OPTION C. The Company agrees to pay the maturity value and interest in annual, semi-annual, quarterly or monthly payments, said interest to accrue and be credited annually from date of the maturity of this Certificate. The schedule on the following page specifically sets forth the amounts payable hereunder pro rata per $1,000 of the face amount of this Certificate. To ascertain the semi-annual, quarterly, or monthly payments divide the annual amount shown by two, four or twelve as the case may be. In the event the second party should elect to exercise either this option or the special settlement option given on the face of this Certificate, and during the life thereof request cash in full settlement, the amount payable shall be the then present worth of the unpaid installments computed from the last interest accrual date at 5½% interest per annum.

SCHEDULE OF SETTLEMENTS UNDER OPTION C.
ON BASIS OF $1,000.00 MATURITY VALUE

Number of Annual Payments	PAYMENTS TO BEGIN										
	At Maturity	1 Year After Maturity	2 Years After Maturity	3 Years After Maturity	4 Years After Maturity	5 Years After Maturity	6 Years After Maturity	7 Years After Maturity	8 Years After Maturity	9 Years After Maturity	10 Years After Maturity
1	$1,000.00	$1,055.00	$1,113.00	$1,174.00	$1,238.00	$1,307.00	$1,378.00	$1,454.00	$1,534.00	$1,619.00	$1,708.00
2	513.35	541.60	571.40	602.80	635.50	670.95	707.83	746.76	787.83	831.16	876.85
3	351.36	370.65	391.00	412.50	434.95	459.20	484.39	511.03	539.14	568.79	600.05
4	270.40	285.25	300.95	317.50	334.70	353.40	372.84	393.35	414.98	437.80	461.85
5	221.95	234.15	247.05	260.60	274.75	290.05	306.05	322.87	340.62	359.36	379.10
6	189.20	200.15	211.15	222.80	234.85	247.95	261.57	275.95	291.13	307.14	324.05
7	164.75	173.95	185.60	195.80	206.55	217.95	229.92	242.57	255.91	269.98	284.85
8	145.80	157.85	166.50	175.65	185.30	195.55	206.27	217.62	229.59	242.22	255.55
9	130.30	137.80	145.75	153.80	162.85	171.15	180.94	190.27	200.18	220.68	232.85
10	117.75	124.65	131.75	139.05	147.65	155.75	164.30	173.39	182.95	192.99	214.75
11	107.70	113.95	120.55	127.50	134.80	142.05	150.05	158.46	167.34	176.71	186.60
12	98.95	104.65	110.70	117.10	123.80	130.80	137.80	145.60	153.74	162.21	171.02
13	91.30	96.60	102.15	108.00	114.20	120.70	127.50	134.60	142.05	149.85	158.00
14	84.60	89.50	94.65	100.10	105.85	111.90	118.25	124.90	131.85	139.10	146.70
15	78.65	83.20	88.00	93.05	98.35	104.00	109.90	116.05	122.50	129.25	136.30
16	73.35	77.60	82.05	86.80	91.75	97.00	102.50	108.25	114.30	120.60	127.20
17	68.60	72.55	76.75	81.15	85.80	90.70	95.85	101.20	106.85	112.75	118.95
18	64.30	68.00	71.95	76.05	80.40	85.00	89.80	94.85	100.15	105.70	111.50
19	60.45	63.95	67.60	71.50	75.60	79.90	84.45	89.20	94.15	99.35	104.80
20	56.95	60.25	63.70	67.35	71.20	75.25	79.50	84.00	88.70	93.60	98.75



ASSIGNMENT

For value received, the undersigned, the owner of the within contract, does hereby sell, assign, transfer, and set over to

_____ of _____ State of _____,

the said contract and all rights acquired and subject to all terms, conditions and agreements therein contained.

Witness my hand and seal this _____ day of _____ 19____

In the Presence of

_____ _____ *(SEAL)*

_____

This Assignment will not be valid until approved by the Syndicate and entered upon its books and a transfer fee of $1.00 is paid.

The above Assignment is made upon the books of the Syndicate and approved this _____ day of _____ 19____

_____ PRESIDENT.
SECRETARY.

ASSIGNMENT

For value received, the undersigned, the owner of the within contract, does hereby sell, assign, transfer, and set over to

_____ of _____ State of _____,

the said contract and all rights acquired and subject to all terms, conditions and agreements therein contained.

Witness my hand and seal this _____ day of _____ 19____

In the Presence of

_____ _____ *(SEAL)*

_____

This Assignment will not be valid until approved by the Syndicate and entered upon its books and a transfer fee of $1.00 is paid.

The above Assignment is made upon the books of the Syndicate and approved this _____ day of _____ 19____

_____ PRESIDENT.
SECRETARY.

10E

EXHIBIT "B"



FOUNDED 1894

INVESTORS SYNDICATE

INCORPORATED UNDER THE LAWS OF THE STATE OF MINNESOTA

MINNEAPOLIS, MINNESOTA

FIVE PER CENT. COUPON CERTIFICATE

For Value Received, the Investors Syndicate promises to pay to the registered owner hereof, at the expiration of TEN YEARS *from the date of this Certificate, upon its presentation and surrender to the Investors Syndicate, at its home office in Minneapolis, Minnesota,*

ONE THOUSAND DOLLARS

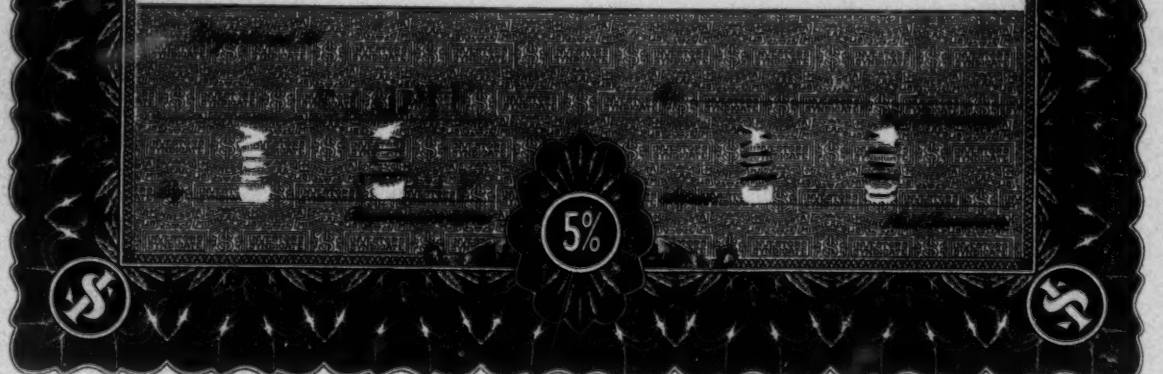
with interest thereon at the rate of five per centum per annum from date, on presentation and surrender of the annexed coupons payable to bearer as they severally become due, payable semi-annually at the home office of the Investors Syndicate at Minneapolis, Minnesota.

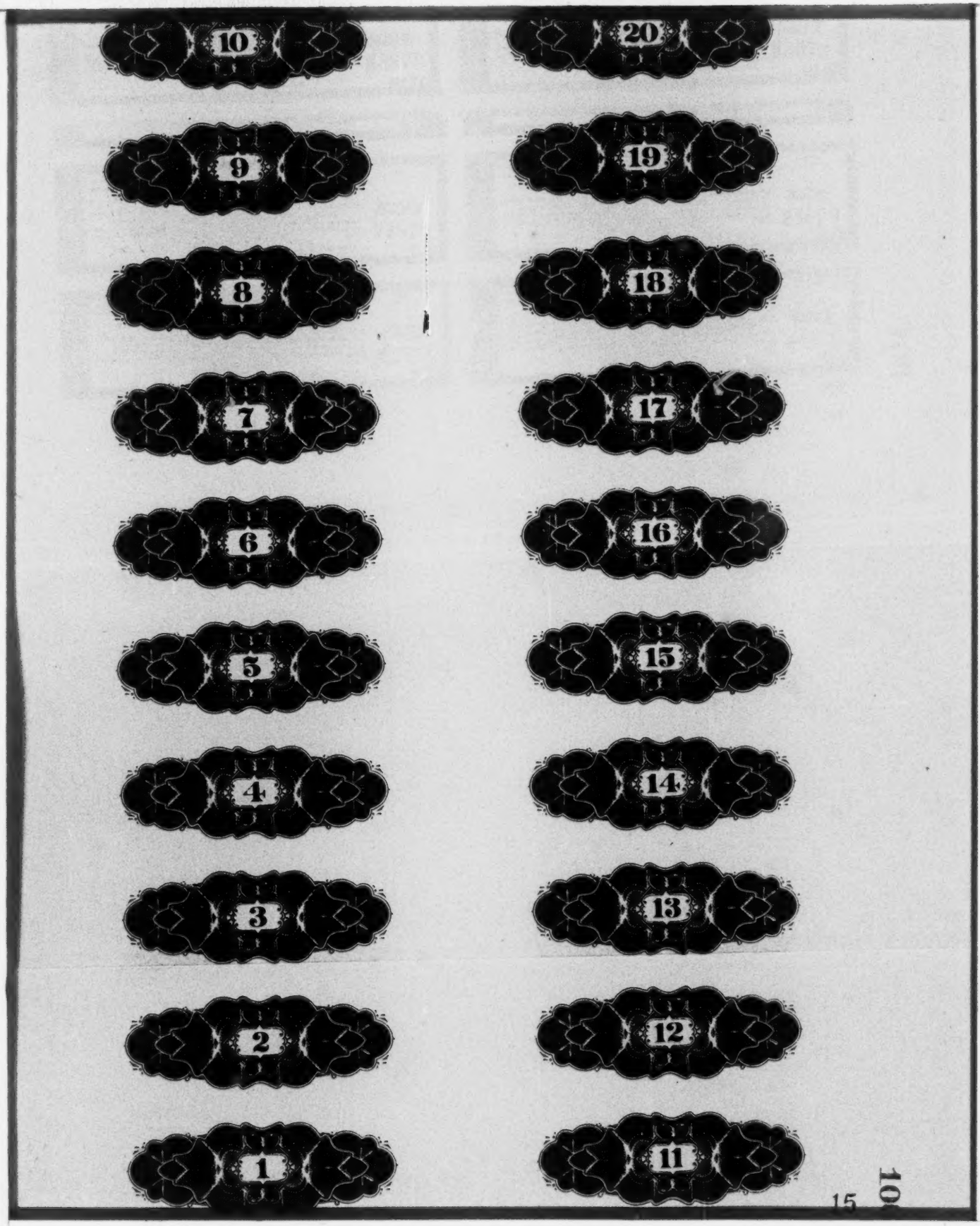
This Certificate and all unpaid coupons may be surrendered at any time and thereupon full face value will be paid to the registered owner, together with interest to the last interest paying date. The Investors Syndicate, if it so desires, may require ninety days notice from the registered owner hereof of the intention so to surrender this Certificate, and Investors Syndicate reserves the right at any time at its option to call in this Certificate by paying the registered owner the full amount thereof, together with accrued interest.

The Investors Syndicate agrees to keep and maintain at all times cash, United States Government Bonds and/or first mortgages on improved real estate in an amount equal to at least one hundred per centum of its liability hereunder and under all other like outstanding Certificates issued by it.

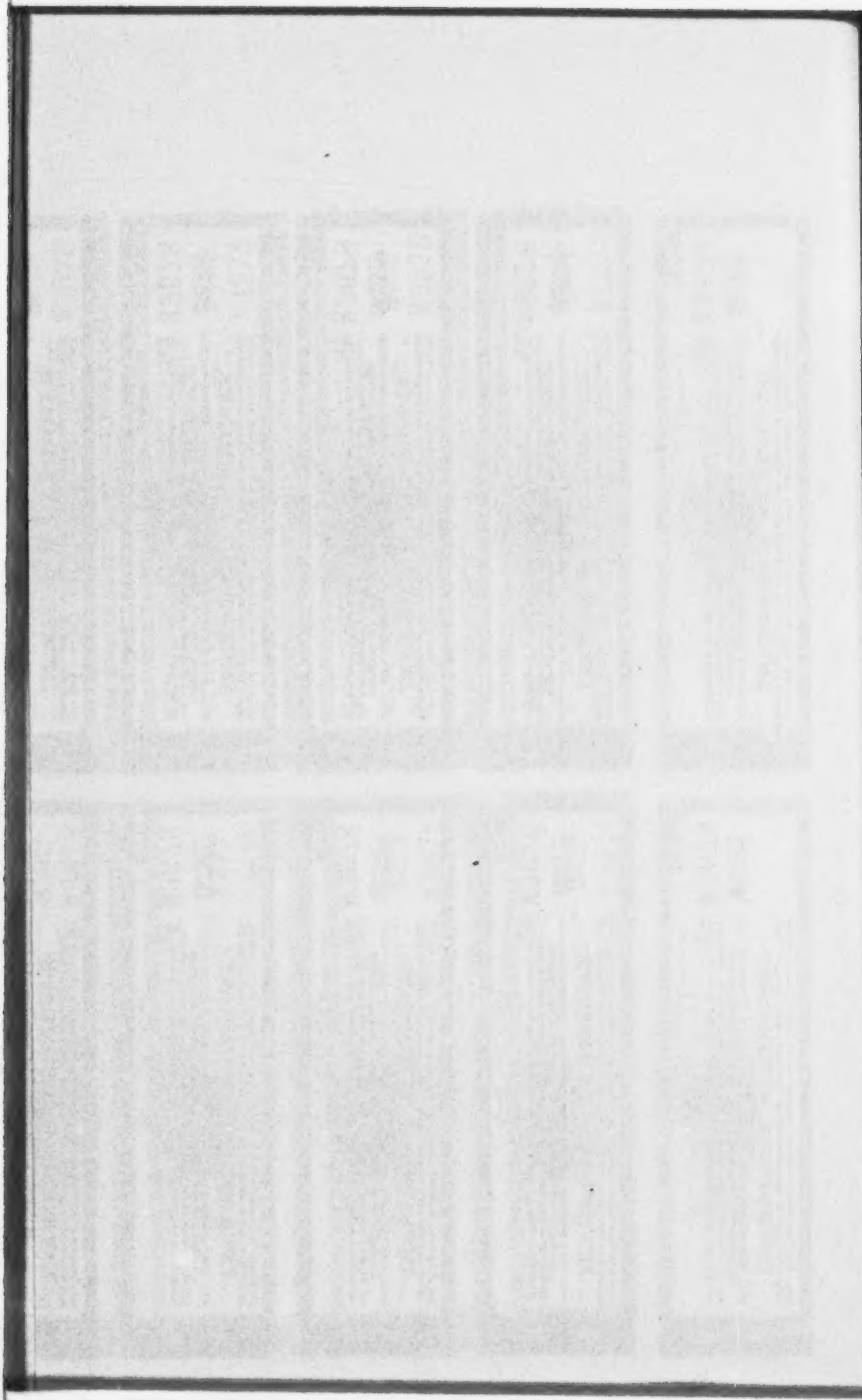
IN WITNESS WHEREOF, the Investors Syndicate has caused this Certificate to be executed by its proper officers thereunto duly authorized and its corporate seal affixed at its office in the City of Minneapolis, Minnesota, this SAMPLE *day of* _____ *19*__

Investors Syndicate,




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1
11


UNLESS THE CERTIFICATE HEREIN MENTIONED SHALL HAVE BEEN CALLED OR SURRENDERED FOR PREVIOUS REDEMPTION
INVESTORS SYNDICATE
$25.00
No M3678
No20
No19
No18
No17
No16
No15
No14
No13
No12
No11
No10
No9
No8
No7
No6
No5
No4
No3
No2
No1



[fols. 16 & 17] EXHIBIT "C" TO BILL OF COMPLAINT

No. 391

State of Montana, Investment Department, State Auditor's Office

Wm. Keating, Investment Comm.

This statement is to certify that the Investors Syndicate, with head offices at Minneapolis, Minnesota, has complied with the provisions of House Bill No. 325, Session Laws of 1913, which became a law and went into effect on March 13, 1913, and Chapter No. 179 Session Laws 1929, and that detailed information regarding it and the Securities offered by it for sale is on file in this office for public inspection and information, and said Investors Syndicate is permitted to do business in this state.

But this department in nowise recommends the above-named securities.

In witness whereof I have hereunto set my hand and affixed the official seal of this office the 8th day of January, 1930.

(Signed) Geo. P. Porter, State Auditor and Investment Commissioner ex-Officio. (Official Seal.)

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

AMENDMENTS TO BILL OF COMPLAINT—Filed June 26, 1931

Now comes the plaintiff and alleges, as amendments to its bill of complaint, to be designated as paragraphs X-A, X-B, X-C, and X-D, and to be inserted on page 6 of said bill of complaint after paragraph X:

X-A

That if the provisions of said Section 4043, authorizing the Investment Commissioner to revoke a permit granted

by him at any time for cause to him sufficient, is construed to authorize said Commissioner of revoke the permit issued to this plaintiff, because in his judgment the certificates which plaintiff is offering for sale do not promise or furnish a fair return to the investor, said provision is violative of and in conflict with the due process of law clause of the 14th Amendment, for the reason that it is not within the legislative power of the state to fix, determine, or otherwise regulate the return promised or furnished by such contracts, and the effect of the cancellation of such permit, for said reason, would be to deprive plaintiff of its liberty and property without due process of law.

[fol. 19] X-B

That if said Section 4045 is construed to authorize the Investment Commissioner to cancel the permit issued by him to plaintiff, because it appears to him that the plaintiff is conducting its business in an inequitable manner, for the reason that the certificates which plaintiff is offering for sale do not promise or furnish a fair return to the investor, the provision of said section authorizing the cancellation of such permit for such reason is in conflict with and violative of the due process of law clause of the said 14th Amendment, for the reason that it is not within the legislative power of the state to fix, determine, or regulate such return, and the effect of the cancellation of such permit for said reason would be to deprive plaintiff of its liberty and property without due process of law.

X-C

That the said rule or order is violative of the provision of Section 1 of Article V of the Constitution of Montana, which declares that "the legislative authority of the state shall be vested in a legislative assembly consisting of a senate and house of representatives" for the reason that the making and issuing of said rule and order is an exercise of legislative power.

X-D

That the said rule or order deprives plaintiff of its liberty and property, without due process of law, in violation of the 14th Amendment, for the reason that it is not within the power of the Investment Commissioner to cancel or revoke

the permit issued to plaintiff, because, in his judgment, or because it appears to him that the certificates plaintiff is offering for sale do not promise or furnish a fair return to the investor or because, in his judgment, or it appears to him, that the withdrawal privilege contained therein is inequitable or unfair.

[fols. 20-23] M. S. Gunn, Gunn, Rasch, Hall & Gunn, Solicitors for Plaintiff.

Service of the foregoing Amendments admitted and receipt of copy thereof acknowledged this 26th day of June, A. D. 1931.

L. A. Foot, Attorney General, for Defendant and Self. J. E. Erickson, Governor, by Will Aiken, Secretary.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

ANSWER—Filed June 29, 1931

Now comes the above named defendant and for his answer to the bill of complaint and amendment thereto on file herein admits, alleges and denies as follows:

I

Defendant admits as true the allegations contained in paragraph I of said Bill of Complaint.

II

Answering paragraph II of said Bill of Complaint, defendant admits that this is a suit of civil nature and the matter in controversy exceeds, exclusive of interests and costs, the sum or value of Three Thousand Dollars ($3,000.00) and is wholly between citizens of different states but denies that this is a suit arising under the Constitution of the United States.

III

Answering paragraph III of the said Bill of Complaint, this defendant admits upon information and belief, the matters and things therein set forth and alleges the fact to be that said plaintiff has been engaged in selling certain [fol. 25] stock and certificates to the general public in said state since the twenty-third day of March nineteen hundred and twenty-six, as is evidenced by License No. 291 filed in the office of the defendant.

IV

Answering paragraph IV of the said Bill of Complaint, this defendant admits as true the matters and things therein set forth.

V

Answering paragraph V of the said Bill of Complaint, this defendant admits as true the allegations, matters and things therein set forth, but denies that on the eighth day of January 1930, at the time of issuing said permit, plaintiff's Exhibit A attached and made a part of the Bill of Complaint herein was on file in said office, or that this defendant had any knowledge at the time of issuing of said permit of the contents of said Exhibit A, attached to and made a part of said Bill of Complaint.

VI

Answering paragraph VI of said Bill of Complaint the defendant admits as true the allegations, matters and things therein contained.

VII

Answering paragraph VII of said Bill of Complaint, this answering defendant admits as true the allegations, matters and things therein contained.

Defendant alleges that said findings of fact and order set forth in paragraph VII of said Bill of Complaint were made pursuant to a notice served upon the above named plaintiff and all other investment companies conducting similar business, and dated the seventh day of May 1931. The above named plaintiff and all others interested were notified that a hearing would be held by said investment

commissioner at his office at Two o'clock P. M. on the Twenty-third day of May 1931, at which time and place a hearing would be held relative to promulgating the order [fol. 26] set forth in the said paragraph seven of the said Bill of Complaint; at which time the above named plaintiff appeared and asked for further time up to and including the first day of June 1931 in which to appear, which request was granted; that an abstract of the proceedings had on said dates including the evidence offered and objections made and showing the appearances made by the various companies interested in said order, is hereto attached marked Exhibit A, and made a part hereof.

VIII

Answering paragraph VIII of said Bill of Complaint, answering defendant admits as true the allegations, matters and things therein set forth.

IX

Answering paragraph IX of said Bill of Complaint, this answering defendant denies that the provision of Section 4036 of the Revised Codes of Montana 1921 is in violation of, or repugnant to, or in conflict with Section I of Article XIV of the Amendments to the Constitution of the United States in the particulars as set forth in said paragraph, or otherwise or at all.

X

Answering paragraph X of said Bill of Complaint, this answering defendant denies that Section 4045 of the Revised Codes of Montana 1921 is in violation of, or repugnant to, or in conflict with the due process of law clause of the Fourteenth Amendment to the Federal Constitution in the particulars as therein set forth, or otherwise or at all.

X-A

Answering paragraph X-A in said Bill of Complaint, defendant denies each and every allegation made and matter and thing contained therein.

X-B

Answering paragraph X-B, defendant denies that said Section 4045 is in conflict with and in violation of the due

process of law clause of said Fourteenth Amendment in relation to the matters and things therein set forth or otherwise or at all.

[fol. 27]

X-C

Answering paragraph X-C defendant denies that said rule or order is violative of the provisions of Section I of Article V of the Constitution of Montana in relation to the matters and things therein set forth or otherwise or at all.

X-D

Answering paragraph X-D defendant denies that said rule or order is in violation of the Fourteenth Amendment in relation to the matters and things therein set forth or otherwise or at all.

XI

Answering paragraph XI of said Bill of Complaint this answering defendant denies that the said rule or order therein mentioned is arbitrary, unreasonable, illegal, in violation of, or in conflict with the due process of law clause of said Fourteenth Amendment therein referred to and denies that said rule will deprive plaintiff of its property, consisting of said permit, or the right to sell its certificates in the State of Montana, or of its liberty of making or entering into contracts evidenced thereby without due process of law and denies that said order will deny to plaintiff the equal protection of the law.

XII

Answering paragraph XII of the said Bill of Complaint, answering defendant admits in said Bill of Complaint that in 1930 the said plaintiff sold in the State of Montana, certificates of the maturity value of $2,141,200 and that there were approximately forty-five hundred holders of such certificates within the State. As to the other allegations, matters and things in said paragraph set forth, this answering defendant alleges he has no knowledge or information sufficient upon which to form a belief and therefor denies the same.

XIII

Answering paragraph XIII of said Bill of Complaint, [fol. 28] this answering defendant admits that the plain-

tiff's methods of selling certificates is by means of agents and that the plaintiff now has over twenty agents or salesmen in said state, all of whom have been duly licensed to sell certificates by said defendant. As to the other allegations, matters and things in said paragraph contained, this answering defendant alleges he has no knowledge or information sufficient to form a belief and therefor denies the same.

XIV

Answering paragraph XIV of said Bill of Complaint, this answering defendant denies that the penalty as provided by section 4049 of the revised codes of Montana 1921 for a violation of the provisions of said Blue Sky Law is in conflict with or repugnant to, or violative of the due process of law clause of the said Fourteenth Amendment, or denies this plaintiff equal protection of the law in violation of said amendment.

XV

Answering paragraph XV of said Bill of Complaint, this answering defendant alleges he has no knowledge or information sufficient to form a belief, and therefor denies the same.

XVI

Answering paragraph XVI of said Bill of Complaint, this answering defendant denies that said certificate marked Exhibit A and made a part of the plaintiff's Bill of Complaint was ever presented to or filed with this defendant prior to the issuance of said permit and alleges the facts to be that any permit or permits issued by this defendant approving contracts similar to Exhibits A and B attached to said Bill of Complaint were issued by this defendant inadvertently and through misapprehension and without knowledge of the unfair, unjust and inequitable plan of operation of said contracts, particularly as the same relate to the withdrawal provisions and penalties to which the owners and holders thereof are subjected.

[fol. 29] XVII

Answering paragraph XVII, defendant denies each and every allegation, matter and things therein contained.

XVIII

Wherefore your answering defendant prays that said Bill of Complaint be dismissed, and he goes hence with his costs.

Dated this 29th day of June, A. D. 1931.

—— ——, Attorney General, State of Montana; —— ——, Assistant Attorney General, State of Montana; Stewart and Brown, Resident- of Helena, Montana; J. W. Freeman, Resident of Great Falls, Montana, Solicitors for Defendant.

[fol. 30] *Duly sworn to by Geo. P. Porter. Jurat omitted in printing.*

[fol. 31] EXHIBIT "A" TO ANSWER

BEFORE THE INVESTMENT COMMISSIONER OF THE STATE OF MONTANA

In the Matter of Fixing the Maximum Amount of Withdrawal Penalty Allowable on Payments on Installment Bonds, Collateral Trust Certificates, Savings Certificates, and Instruments Creating a Debtor-creditor Relationship of Investment Companies

INVESTORS SYNDICATE, INSTALLMENT SECURITIES AGENCY, Incorporated; Universal Bond and Mortgage Corporation, International Guaranty Thrift Syndicate, Great Western Bond and Mortgage Corporation, Decker Mortgage Company, National Thrift Corporation of America, National Bond Corporation, National Mortgage Bond Corporation of Montana, United Bond and Finance Corporation

Order

Before Geo. P. Porter, State Auditor and ex Officio Investment Comissioner

Hearings held May 23 and June 1, 1931, at the State Capitol Building, Helena, Montana. The following appearances were made:

APPEARANCES

Investors Syndicate and Installment Securities Agency, Incorporated, H. W. Berg, Vice-President, and M. S. Gunn, Counsel.

Universal Bond and Mortgage Company, Paul Hudtloff, Vice-President; H. J. Fennimore, Director, and Frank Venable, Montana, Manager.

International Guaranty Thrift Corporation, F. M. Zimmers, President.

Great Western Bond & Mortgage Corporation, by written record.

Decker Mortgage Company, no appearances.

National Thrift Corporation of America, no appearances.

National Bond Corporation, R. M. Tone, President.

National Mortgage Bond Corporation of Montana, no appearances.

United Bond and Finance Corporation, Guy M. Miller, State Manager, and Earle Genzberger, Counsel.

The corporations cited to appear in this action were all engaged in selling in Montana installment certificates, bonds and other securities creating a debtor-creditor relationship on the installment plan. The general procedure is to sell certificates on the basis of One Thousand Dollars debenture at maturity, at the rate of approximately $6.25 [fol. 32] per month, with the security maturing at periods generally ranging from ten to eleven years. In computing the maturity value the interest rate offered varies from 5½% to 7%, which is included in the aggregate in determining the maturity value of the security. The character of the security ranges from promissory notes to bonds and in certain cases financial institutions act as trustees, but in others it has been the policy for the company to be the guarantor. These contracts carry a provision that no withdrawals will be permissable prior to periods ranging from 18 months to three years. Furthermore, the provisions of the contract provide that in the event a subscriber desires to withdraw and terminate his contract that the withdrawal value of said certificate shall be the amount paid in, less penalty ranging from 3½% to 8% of the matured value of the security. The penalty is ordinarily called a loading charge and the companies attempt to jus-

tify the same on the grounds that it is one of their methods of procuring funds for selling costs and general operation.

As an example of an aggravated case the Commissioner has a complaint from a subscriber who has paid $260.00 on a $2,500.00 contract and 26 payments of $10.00 each and upon his application to withdraw the company offered to return $60.15.

A portion of the Investment Companies in this action were operating in Montana prior to the enactment of the present Investment Act while others have filed with the Commissioner since that time.

The present period of depression has largely changed conditions and wage earners who were the principal subscribers for installment securities find themselves without positions and unable to continue payments on their contracts. The majority of the complainants seem to be of the opinion that they can withdraw their money and when exhorbitant penalties are imposed, the resultant effect is apparent.

This hearing resolves itself into two issues:

First, that installment companies shall make settlement with their subscribers at any time after the contract has been in effect one year, upon service of proper notice.

Second, that the maximum withdrawal penalty allowed [fol. 33] shall not exceed 3½% or $35.00 per thousand, of the face or matured value of the security.

Prior to the hearing the Commissioner served the following notice on each of the Investment Companies included herein:

NOTICE OF HEARING

"Complaints having been made to the Investment Commissioner that the penalties for withdrawals fixed by investment companies operating in the State of Montana are excessive, unfair, unjust, inequitable and oppressive, to its contributors as provided in Section 4036 of the Revised Codes of Montana, 1921,

Therefore, you, and each of you, are hereby notified that this Commission will at 2:00 o'clock p. m. on the twenty-third day of May, 1931, at the office of the Commissioner, at the State Capitol, at Helena, Montana, conduct a hearing relative to promulgating the following rule:

'In the interests of the investing public, any investment company operating in the State of Montana shall not issue,

sell or distribute, any bonds, certificates of indebtedness, collateral trust certificates or any other device whatsoever, that might be deemed a security creating a debtor-creditor relationship, which has a withdrawal privilege, before maturity, that does not provide for withdrawal of installments paid thereon due any time after the first year, if the owner or holder shall have given ninety (90) days notice in writing of his intention to make such withdrawal and such owner or holder shall be entitled to receive the total amount of all installments paid in, less only a withdrawal penalty not exceeding three and one-half (3½) per cent of the matured or face value of such securities, plus interest compounded annually at the rate at which said securities are guaranteed to mature or represented to pay at maturity; and provided further, that the bond or contract representing such security and the application for the same shall have printed thereon, the amount paid in, the withdrawal or surrender value thereof, and the loan value at the end of each year of its duration.

It is further provided that none of the above securities as enumerated shall be permitted to be sold in the State of Montana unless there is a withdrawal privilege provided each year beginning with the first year until maturity.'

You and each of you are hereby given an opportunity to appear and present any objections you may have as to the reasonableness of said proposed ruling.

Dated at Helena, Montana, this seventh day of May, 1931.

(Signed) Geo. P. Porter, State Auditor and ex Officio Investment Commissioner."

At the hearings the Commissioner briefly reviewed the purpose of the meetings and witnesses were duly sworn. The Deputy Investment Commissioner introduced in evidence a letter from the Great Western Bond and Mortgage [fol. 34] Corporation, as follows:

"Great Western Bond and Mortgage Corporation, 707 South Hill Street, Los Angeles, California

May 19, 1931.

Hon. George P. Porter, State Auditor & ex Officio Investment Commissioner, Helena, Montana.

DEAR SIR: As per your request of the 8th instant, we wish to acknowledge receipt of your notice of hearing with

respect to a ruling providing a loading charge of 3½ per cent on contracts or certificates issued by investment companies.

In reply thereto, we might state we are surprised to learn that this corporation has been included in this public hearing to be held on May 23rd, as we have voluntarily placed our loading charge at 3½ per cent. We do not wish to criticise as we are endorsers of such a ruling, but we feel that we should not be placed in the same category as the companies who are charging more than 3½ per cent, and brought out into the limelight with them on this hearing. You can very readily understand under these circumstances we might be criticised by the public and openly accused of making unfair deductions where in reality we have not.

In fairness to us some statement should be made at this hearing that we have not issued any installment certificates with a loading charge of more than Thirty Five dollars ($35.00) per thousand in order that we will not be unjustly criticised.

This is only a suggestion, Mr. Porter, which we trust will receive your kind consideration.

Wishing you success and assuring you of our co-operation at all times, with kindest personal regards, I beg to remain,

Respectfully yours, (Signed) Earl Lund, Earl Lund, President."

EL:DD.

In behalf of the Commissioner Exhibit "B", showing the cash or loan value of both the Universal Bond & Mortgage Corporation and the Great Western Bond and Mortgage Corporation, was introduced as follows:

EXHIBIT "B"

"Cash or Loan Values

Universal Bond & Mortgage Corporation

Monthly Payment, $6.30; Quarterly, $18.85; Semi-Annual, $37.50; Annual, $74.00

[fol. 35]

Year	
1st	$45.00
2nd	123.16

Year	
3rd	202.78
4th	287.92
5th	380.97
6th	488.11
7th	603.34
8th	727.81
9th	861.22
10th	1000.00

Great Western Bond & Mortgage Corporation

Monthly Payment, $6.30; Quarterly, $18.85; Semi-Annual, $37.50; Annual, $74.00

Year	
1st	$41.00
2nd	118.00
3rd	210.00
4th	302.00
5th	398.00
6th	499.00
7th	608.00
8th	730.00
9th	860.00
10th	1038.00"

It will be noted that both of these companies above mentioned, although parties to this action, do not charge in excess of 3½% withdrawal penalty.

There was also offered in evidence as Exhibit "C" a letter from Mr. C. H. Scott, President of the Prudential Bond & Mortgage Company, Inc., Little Rock, Arkansas, as follows:

EXHIBIT "C"

"Prudential Bond & Mortgage Company, Inc., Suite 318 Bankers Trust Building, Little Rock, Arkansas

May 19, 1931.

Mr. George C. Porter, State Auditor & ex Officio, Securities Commissioner, Helena, Montana.

DEAR MR. PORTER: You are to be congratulated on account of the courageous stand you are taking in regard to

monthly installment savings certificates or any other indebtedness of any corporations or investment firms selling a monthly savings contract with a prohibitive, unfair acquisition cost.

Most of the purchasers of these monthly installment savings certificates are made up of school teachers, railroad employees and salaried men and women who still buy a [fol. 36] whole lot on what the salesmen have to say. I think I am safe in saying that only one out of ten realize that some of these companies have on acquisition cost as high as $72 per $1000. They buy in good faith hoping to carry it to maturity, but little do they dream that if something should happen in 14 to 16 months that he or she would not have a dollar cash value built into their contract. There have actually been thousands of purchasers deceived by salesmen representing contracts of this character.

I sold building and loan stock for seven years before organizing the Prudential Bond and Mortgage Company three years ago. I never did receive but one per cent of the maturity value, or $10 per $1000. About five years ago I was offered the State of Arkansas by two thrift companies promising me $45 per $1000 but I told our Commissioner that before I would sell securities with that kind of acquisition cost that I would go into some other business as an individual could not build up good will and retain the respect of his fellow-men in selling contracts with an acquisition cost of $67.50 or $72 per $1000. The acquisition cost is not only prohibitive but most of the contracts are most deceptive. They have to be in order for the salesmen to sell any large volume.

It would be a great move on your part if you would write every Commissioner or Department which supervises securities telling them of the decisive stand that you have taken and give them your ideas. I think that most Commissioners would realy take the stand that you have if they realized how many purchasers were actually deceived by the salesmen.

The enclosed bond of the Prudential has an acquisition cost of two per cent of the maturity value, which is $20.00 per $1000. This contract is very simple and most all purchasers can absolutely understand what they have bought. The Table of Values shows the cash or surrender value at

the end of each year after 12 months but we have a cash value even before the 12 months. It takes most of the first three monthly payments to absorb the two per cnt acquisition cost. In other words, on the $1000 contract the purchaser would pay in $87.72 the first 12 months, plus 5½% interest, compounded semi-annually, or $1.60, totalling $89.32, less $20.00 per $1000 leaving a cash value of $69.32.

I have had enough experience with this contract to convince me if we were to operate in other states that possibly we would have to raise our acquisition cost to 2½ or 3½ per cent as you have suggested in your proposal.

I am not sending you this copy for the purpose of wanting to qualify in your state but I am most interested in the stand you have taken as I have specialized in selling savings accounts for ten years.

I would greatly appreciate a complete report of your meeting and only hope that I will be advised that you will mail this to all Commissioners and all the Attorney-Generals.

Any courtesy extended in this matter will be greatly appreciated.

Yours very truly, (Signed) C. H. Scott, President."

[fol. 37] There was further testimony to the effect that withdrawal penalties in the past, imposed by installment companies operating in the State of Montana, have ranged from 3½% to 8% of the face value of the matured obligation and that these charges were considered highly oppressive and the plan of business unsound, unjust and inequitable to the contributor thereto.

Mr. Frank Venable, Montana Manager of the Universal Bond and Mortgage Corporation, testified as follows:

"I am authorized by the Universal Bond and Mortgage Corporation, a Delaware corporation, with home office in Portland, Oregon, to state that having never charged as much at 3½% withdrawal value on our contracts, we have no objection to the present ruling as proposed by the Investment Commissioner and our present permit, as we understand, has been granted to us on that basis.

We shall be glad to continue to operate on that basis and to cooperate with your department in that ruling."

Mr. P. C. Bulen, President of the Mountain States Building and Loan Association, Great Falls, Montana, testified and introduced as an exhibit a contract entered into between C. Everett or Carrie Davis and an Investment Company, for a $10,000.00 installment thrift bond contract. He stated that at the end of 36 months the subscribers had paid in $1260.00 and that the withdrawal value at the end of three years was $626.00, leaving a loading charge, exclusive of accrued dividends and interest, of $624.00. In other words, at the end of 36 months the loss to the subscribers was $624.00.

In Protest to the Promulgation of the Proposed Ruling

Mr. Guy M. Miller, State Manager of the United Bond and Finance Corporation, issued a protest to the proposed ruling and testied that his company exacted a loading charge of 5%, or $50.00, per thousand on securities sold. This charge is prorated by a payment of 3%, or $30.00, per thousand to the salesman, ½% or $5.00 to the local sales-manager and an additional ½% or $5.00 to the State Manager. He further testified that he did not know what disposition the company made of the remaining 1% or $10.00 per thousand.

[fol. 38] Mr. Genzberger of Butte, Counsel for the same company, also protested the proposed ruling. Mr. Genzberger introduced in evidence Permit #310 of the State Investment Commissioner, dated March 1, 1928, by virtue of which the company was authorized to transact business in Montana. He further testified that the United Bond and Finance Corporation allowed a withdrawal privilege after 24 months, and that an investor may withdraw all the money he has paid in approximately 54 months after maturity, with deductions for the so-called loading charge, the withdrawal value for that period being $555.60, upon which $540.00 has been paid by the subscriber.

Mr. F. M. Zimmers, President of the International Guaranty Thrift Corporation, on behalf of his company said that as a matter of record and for the purpose of reserving all legal rights he desired to be recorded as protesting the

promulgation of the proposed rule. He further stated that one of the most serious features of the rule would be the allowance of withdrawals at the end of one year, and that it would provide the salesman with weapons to make these sales without stating all of the facts. Mr. Zimmers further stated that his company had had but one withdrawal during the previous year from Montana.

Mr. R. M. Tone, President of the National Bond Corporation, testified that his concern was the only domestic company operating in the state. He stated that he felt that all companies should be at liberty to make their own contracts and that he was opposed to withdrawals and the promulgation of this ruling. The National Bond Corporation, under their new contracts, exacted a 5% loading charge.

Mr. H. W. Berg, Vice-President of the Investors Syndicate, testified that in the event the order proposed should be promulgated his company would be forced to litigate or stop operations in the state as the Investors Syndicate could not issue a contract of this kind with safety. He stated the present withdrawal value of their contract at the end of 18 months was $42.00, or, in other words, there was a loading charge of 7.4%. He further testified that their contract was a 10 year contract and not a one year [fol. 39] arrangement and if the commissioner was passing on the basis of one year he would agree with him as to its unfairness. The loading charge of the Investors Syndicate on a thousand dollars was distributed as follows: $45.00 included sales costs, which provided for salesmen's commissions, advertising, a stamp tax of 50¢ per thousand, accountancy, rent and clerical hire. The sum of $12.00 is set aside for hearings, legislation and the death and disability provisions of the contract and certain other incidentals. The amount of $17.00 is set aside for a reserve fund.

The Investors Syndicate has approximately ten million in contracts in effect in Montana and for the year 1930 the cash receipts from the state were $309,456.02, represented in 4437 certificates in force at the end of the year. There were 802 certificate lapsations during the year, representing 18% of the certificates in force and 15% of the total face amount in force. Of this total of 802 certificates 73% at the time of exit had paid but three months or less on their contracts and 75% of the group had made only one

monthly payment and 21 certificates only had been in effect more than one year at the time of the lapsation. Witness further testified that the company paid between $500.00 and $600.00 in taxes in Montana each year.

Mr. M. S. Gunn, appeared on behalf of the Investors Syndicate and Installment Securities Agency, Incorporated, Minneapolis, Minnesota, and vigorously opposed the proposed ruling. Mr. Gunn's attack was principally on the grounds of the power of the Commissioner to prescribe a form of contract and he read into the record the decision in the case of investors Syndicate vs. Becker, Secretary of State of Missouri, et al., in which a restraining order was granted by the federal court of the Central Division of the Western District of Missouri, which court granted a restraining order preventing the state from exercising certain supervision over the complainant. Counsel also cited Investors Syndicate vs. Porter, Commissioner of Finance of the State of Idaho and tried in the federal court of Idaho. He further stated in his opinion that the Commissioner had no authority to enforce the proposed ruling but admitted in a later action that the Idaho Investment Commissioner [fol. 40] had revoked their license for failure to file certain reports and that the action was sustained in the federal court of Idaho.

FINDINGS AND ORDER

1. The Commissioner maintains that Section 4043 of the Revised Codes of Montana, 1921, confers authority for the promulgation of the proposed rule in the following language:

"* * * The Investment Commissioner shall have general supervision and control, as provided by this act, over any and all investment companies and stock brokers, domestic or foreign, licensed under this act."

2. The Commissioner believes that the provisions of Section 4036, Revised Codes of Montana, 1921, providing in part:

"* * * Such permit, however, shall be subject to revocation at any time by the Investment Commissioner for cause to him sufficient."

clearly gives the Commissioner authority to cancel permits.

3. That the above mentioned provision of law impliedly gives to the Commissioner the right to impose a lesser penalty, namely, the removal of all unfair provisions in contracts.

4. That Section 4045 of the Revised Codes of Montana, 1921, provides in part as follows:

"Revocation of Permits and Appointment of Receiver.—Whenever, it shall appear to the investment commissioner that the assets of any investment company doing business in this state are impaired to the extent that such assets do not equal its liabilities, or that it is conducting its business in an unsafe, inequitable, or unauthorized manner, or is jeopardizing the interests of its stockholders or the investors in stocks, bonds or other securities by it offered for sale, or whenever any investment company shall refuse to file any papers, statements, or documents required under this Act, or shall refuse to permit an examination by said investment commissioner, or his deputies or agents, as provided in this Act, without giving satisfactory reasons therefor, said investment commissioner shall at once cancel its permit. * * *"

The Commissioner believes that a loading charge of from 5% to 8% is highly inequitable as this term is defined in this section.

5. That it is unreasonable and inequitable to maintain that investment companies who were operating in Montana [fol. 41] prior to the enactment of the present investment act should not be amenable to the same reasonable and lawful supervision and control by this Commissioner as exercised on companies coming under his supervision at a later date.

6. That this Commissioner is continually receiving complaints to the effect that agents of investment companies misrepresent to prospective purchasers either by not stating the provisions relating to withdrawals or by alleging that investors can procure their money at any time.

7. That in justice to the investing public, during the period of depression, they should not be unreasonably penalized for conditions beyond their control, caused by unemployment or depreciation of commodity values.

8. That the proposed rule is a reasonable one as evidenced by its adoption by certain of the investment companies operating in this state and by testimony produced at the hearing.

9. That a maximum withdrawal penalty of 3½% is amply sufficient in case of forfeiture of investment installment contracts and that withdrawals should be permissable at any time after one year.

It is therefore ordered that from and after the 22nd day of July, 1931, the following rule shall be in full force and effect:

"In the interests of the investing public, any investment company operating in the State of Montana shall not issue, sell or distribute, any bonds, certificate of indebtedness, collateral trust certificates or any other device whatsoever, that might be deemed a security creating a debtor-creditor relationship, which has a withdrawal privilege, before maturity, that does not provide for withdrawal of installments paid thereon due any time after the first year, if the owner or holder shall have given ninety (90) days notice in writing of his intention to make such withdrawal and such owner or holder shall be entitled to receive the total amount of all installments paid in, less only a withdrawal penalty not exceeding three and one-half (3½) per cent of the matured or face value of such securities, plus interest compounded annually, at the rate at which said securities are guaranteed to mature or represented to pay at maturity; and provided further, that the bond or contract representing such security and the application for the same shall have printed thereon, the amount paid in, the withdrawal or surrender value thereof, and the loan value at the end of each year of its duration.

It is further provided that none of the above securities as enumerated shall be permitted to be sold in the State [fols. 42 & 43] of Montana unless there is a withdrawal

privilege provided each year beginning with the first year until maturity."

Dated at Helena, Montana, this 22nd day of June, 1931.
Geo. P. Porter, State Auditor and ex Officio Investment Commissioner.

CPC/ME.

[File endorsement omitted.]

[fol. 44] IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

Present: Hon. William H. Sawtelle, U. S. Circuit Judge; Hon. Geo. M. Bourquin, U. S. District Judge, and Hon. Charles N. Pray, U. S. District Judge

MINUTE ENTRY OF HEARING—June 29, 1931

This cause came on regularly for hearing this day on Plaintiff's application for an interlocutory injunction herein, Mr. M. S. Gunn appearing for plaintiff, and Mr. J. W. Freeman and Mr. T. H. MacDonald, assistant Attorney General of Montana, appearing for defendant.

Thereupon, on motion of Mr. Gunn, the Court ordered that Mr. A. C. Spencer, of Portland, Oregon, be admitted to practice for the purposes of this case and his name entered as associate counsel for plaintiff.

Thereupon, an answer was filed herein by the defendant, whereupon, it was stipulated and agreed by counsel for the respective parties, that the cause be heard and submitted to the court at this time for final determination.

Thereupon, counsel stipulated in open court that the form of certificate attached to the complaint and marked exhibit "A" was not before the Investment Commissioner at the time he issued the permit, but was later approved by letter of February 18, 1930, a form of the certificate approved by issuance of the permit, together with a copy of the aforesaid letter, was introduced as a part of this stipulation.

Thereupon the cause was duly argued by counsel for respective parties and submitted and by the court taken

under advisement, brief being filed at this time by the plaintiff, the defendant being granted five days to file his brief and the plaintiff granted five days thereafter for reply brief.

Thereupon, counsel for plaintiff moved the court to grant a restraining order, as prayed for in the complaint, in the event this case is not decided by July 22, 1931, the date that the order of the Investment Commissioner is made effective.

Entered in open Court June 29, 1931.

C. R. Garlow, Clerk.

[fol. 45] That on June 29, 1931, the copy of letter and certificate referred to in the oral stipulation in the foregoing copy of minute entry was introduced, being as follows, to wit:

February 18th, 1930.

Investors Syndicate, 100 North Seventh St., Minneapolis, Minn.

GENTLEMEN: This is to advise you that we have this day approved your new Installment Investment Certificate presented this department by Mr. M. S. Gunn, of the law firm of Gunn, Rasch, Hall & Gunn, of Helena, Montana.

Yours very truly, —— ——, State Auditor & ex-Officio Investment Commissioner.

CBA-ZB.

(Here follows accumulative installment certificate, side folios 46 and 47)



AMERICAN BANK NOTE COMPANY, LITHO.

46

324

United States of America



FOUNDED 1894

INVESTORS SYNDICATE

INCORPORATED UNDER THE LAWS OF THE STATE OF MINNESOTA

MINNEAPOLIS, MINNESOTA

ACCUMULATIVE INSTALLMENT CERTIFICATE

This is to Certify that in consideration of the payment of _____ Dollars, annually in advance during the period of ten years from date hereof, the Investors Syndicate, first party, hereinafter referred to as the Company, hereby promises to pay to

_____

of _____, hereinafter referred to as the second party, at the expiration of said period, upon presentation and surrender of this Certificate to the Company at its office in the City of Minneapolis, Minnesota, the sum of _____ Dollars.

This Certificate is subject to the privileges, terms and conditions on the second, third and fourth pages hereof which are hereby referred to and made a part hereof, as fully as if set forth in the face of this Certificate.

IN WITNESS WHEREOF, the Company has caused this Certificate to be executed in its corporate name at Minneapolis, Minnesota, this _____ day of _____ 19__

Investors Syndicate,

By _____
President

5½%

32A

PRIVILEGES AND CONDITIONS

1. SECURITY. The company agrees to keep and maintain at all times first mortgages on improved real estate, cash and government bonds in an amount equal to at least $110 for each $100 of its liability hereunder and under all other like outstanding Certificates issued by it, said liability being the cash value as shown in Paragraph 3, less the amount of any loans made thereon.

2. PAYMENTS. In lieu of annual payments, the second party shall have the right to make monthly payments of $6.30, quarterly payments of $18.85, or semi-annual payments of $37.50 on each $1,000 of the face amount hereof, the first payment to be made on the date of the Certificate, and subsequent payments to be made thereafter at or before the beginning of each monthly, quarterly or semi-annual period, as the case may be, time being the essence hereof.

3. CASH AND LOAN VALUE. After this Certificate has been in force for any of the periods shown in the following schedule exclusive of any period or periods of default, and at the end of the periods shown, it shall upon surrender of this Certificate, have a cash value for such period for each $1,000 face amount according to such schedule, or the company will upon deposit of this Certificate as collateral, lend the second party for each $1,000 face amount the loan value according to such schedule:

18 months	2 yrs.	3 yrs.	4 yrs.	5 yrs.	6 yrs.	7 yrs.	8 yrs.	9 yrs.	10 yrs.
$38.50	$78	$160	$247	$339	$450	$567	$690	$818	$1,000

4. DEATH AND PERMANENT TOTAL DISABILITY. In the event of the death of the second party, this Certificate being in force and uncancelled on the books of the company, his legal representatives may elect (a) to continue this Certificate by making payments thereon, or (b) to surrender the same and accept the full amount paid hereon with interest at the rate of 4% per annum compounded annually, computed on sums from dates paid to date of death, subject to the provisions of Paragraph 10 hereof. Should the second party, as a result of sickness or injury, become totally and permanently disabled before he attains the age of sixty years, and unable to engage in any gainful occupation for the balance of his life, he shall be entitled to the benefits stated in the preceding sentence of this paragraph, interest being computed on sums from dates paid to date when second party first becomes so totally and permanently disabled. No sums will be payable until the company has received legal proof of death or the proof of permanent total disability required by it. If this Certificate is issued in the name of one person for the benefit of another, the second option (b) herein shall apply only in the event of the death or such permanent total disability of the first person but the proceeds shall belong to the beneficiary.

5. PAID UP CERTIFICATE. After this Certificate has been in force for any of the periods shown in the following schedule exclusive of any period or periods of default, the second party shall for such period, upon written request and surrender of this Certificate, receive a Paid Up Certificate due at the then maturity date of this Certificate, in the amount for each $1,000 face amount, according to the following schedule:

18 months	2 yrs.	3 yrs.	4 yrs.	5 yrs.	6 yrs.	7 yrs.	8 yrs.	9 yrs.
$80	$119	$232	$340	$443	$557	$665	$768	$863

After this Certificate has attained a cash value, and the second party has failed for a period of two years to make a payment due, the company will, upon written request of the second party or at its own option, cancel this Certificate and issue in lieu thereof a Paid Up Certificate After Default in an amount equal to the then cash value of this Certificate plus interest at 5½% per annum for ten years compounded annually, due ten years from date written request is received, or the option exercised.

6. NON-FORFEITURE CLAUSE. This Certificate may be reinstated at any time by resuming monthly or other specified payments if default has continued for less than two years, but no interest will be allowed hereon during the period of default and, in the event of such resumption of payments, the maturity hereof and the due date of remaining payments shall be extended for a period equal to the time default continued. Notwithstanding that default has continued for a period of two years or more, this Certificate not having attained a cash value, the rights of the second party are not thereby forfeited, but said second party, so long as the Company is engaged in issuing like Certificates, upon the resumption of payments and upon written request and surrender of this Certificate, and the payment of a

reissuance charge of $1.00, shall be entitled to a new Installment Certificate of the kind and rate then being issued as of that date and of like face amount, and to credit in full for all payments made hereon, provided that no part thereof shall be construed as advance payments. Provided further, that if this Certificate has not attained a cash value and default continues for a period of two years, then except as to the right to receive a new Certificate as hereinabove set forth with sums credited thereon, all rights of the second party including the right to sums paid shall cease and determine, and the Certificate shall be of no further force and effect.

7. REINSTATEMENT. In the event the second party shall reinstate this Certificate after default by resuming payments and shall thereafter make up such defaulted payments and apply for the maturity, cash or loan value, he shall be entitled to receive the then present worth of such maturity, cash or loan value for the time paid for computed at 7% per annum for the period from date such loan, cash or maturity value is paid, to the extended due date as specified in Paragraph 6 herein.

8. ADVANCE PAYMENTS. Advance payments in excess of the current year's requirements shall increase the cash and loan value as shown in Paragraph 3 hereof by the amount of such excess plus interest at 5½% compounded annually; whenever the advance payments with interest, and the installment with interest, shall equal the maturity value of the Certificate, then the company will pay semi-annually, interest in cash at 5½% per annum to second party, his heirs or assigns, until maturity. Excess payments shall be applied by the company on annual payments when they become due.

9. ASSIGNMENT. This Certificate if in force and uncancelled on the books of the company may be assigned, but the assignment or transfer hereof shall not be valid without the consent in writing endorsed hereon by the company and a transfer fee of $1.00 paid to the company; provided that in case of assignment the permanent total disability benefits shall apply only if such permanent total disability occurs to the assignee wholly after the assignment is endorsed by the company hereon.

10. MISCELLANEOUS. No agent or other person has authority to alter or change the terms of this Certificate, or bind the Company by any statement, written or oral, not herein contained. Unless otherwise ordered by the Board of Directors of the Company, a sum not to exceed 50% of the total cash receipts received during the current calendar month may be used for paying the cash, death and disability values, optional settlements, and for making loans under this and like Certificates. It is agreed that any such payments shall be paid by the Company in the order of application therefor.

The Company shall have the right at all times to call in this Certificate and cancel the same by paying the second party the full amount paid hereon together with interest at 5½% compounded annually for the time the company has had the use of the money, less any indebtedness due the company, and shall have a like right to call in and pay off any Certificate issued in lieu hereof or the optional settlements herein by paying the then present worth computed on the basis of 5½% compounded annually, less any loans made thereon.

11. CASH IN FULL GUARANTEED AT MATURITY. Anything in this Certificate to the contrary notwithstanding, the second party shall at the time of maturity be entitled to receive, and the company guarantees then to pay in cash the face amount hereof less any indebtedness due the company.

12. OPTIONAL SETTLEMENT AT MATURITY. The second party may elect in lieu of cash when this Certificate matures, either of the following settlements, by notifying the company of his election prior to maturity and having such election endorsed by the company on this Certificate.

OPTION A. Leave the cash with the company and the company agrees to keep and maintain the same class of security as specified in paragraph one in an amount not less than its liability, and to pay interest at 5½% per annum at the end of each six months, or if interest is allowed to accumulate, all sums will be compounded annually. At any time after maturity the second party may request final settlement, and upon request principal and accrued interest will be paid by the company.

OPTION B. Leave the cash with the company and the company agrees to keep and maintain the same class of security as specified in paragraph one in an amount not less than its liability, and should the second party elect to exercise this option, the company agrees to pay the face value and interest in annual, semi-annual, quarterly or monthly payments as per the schedule on the following page. To ascertain the semi-annual, quarterly or monthly payments divide the annual amount shown by two, four or twelve as the case may be. In the event the second party should elect to exercise this option and during the life thereof request cash in full settlement, the amount payable shall be the then present worth of the unpaid installments computed at 5½% interest per annum. The schedule on the following page shall apply pro rata per $1,000 of the face amount of this Certificate.

SCHEDULE OF OPTIONAL SETTLEMENTS
ON BASIS OF $1,000.00 MATURITY VALUE

Number of Annual Payments	Payments to Begin						
	At Maturity	1 year after Maturity	2 years after Maturity	3 years after Maturity	4 years after Maturity	5 years after Maturity	10 years after Maturity
1	$1,000.00	$1,055.00	$1,113.00	$1,174.00	$1,238.00	$1,307.00	$1,708.00
2	513.35	541.60	571.40	602.80	635.50	670.95	876.85
3	351.30	370.65	391.00	412.50	434.95	459.20	600.05
4	270.40	285.25	300.95	317.50	334.70	353.40	461.85
5	221.95	234.15	247.05	260.60	274.75	290.05	379.10
6	189.70	200.15	211.15	222.80	234.85	247.95	324.05
7	166.75	175.95	185.60	195.80	206.55	217.95	284.85
8	149.60	157.85	166.50	175.65	185.30	195.55	255.55
9	136.30	143.80	151.75	160.05	168.85	178.15	232.85
10	125.75	132.65	139.95	147.65	155.75	164.30	214.75
11	117.10	123.55	130.35	137.50	145.05	153.05	200.05
12	109.95	116.00	122.40	129.10	136.20	143.60	187.85
13	103.95	109.65	115.70	122.05	128.75	135.75	177.55
14	98.80	104.25	110.00	116.05	122.40	129.15	168.80
15	94.40	99.60	105.10	110.85	116.95	123.30	161.30
16	90.55	95.55	100.80	106.35	112.20	118.30	154.70
17	87.20	92.00	97.10	102.40	108.05	113.90	149.00
18	84.25	88.90	93.80	98.95	104.35	110.05	143.95
19	81.65	86.15	90.85	95.85	101.10	106.65	139.45
20	79.30	83.65	88.25	93.10	98.20	103.55	135.45

ASSIGNMENT

For value received, the undersigned, the owner of the within contract, does hereby assign to

_____ of _____ State of _____,

the said contract and all rights acquired and subject to all terms, conditions and agreements therein contained.

Witness my hand and seal this _____ day of _____ 19____

In the Presence of

_____ _____

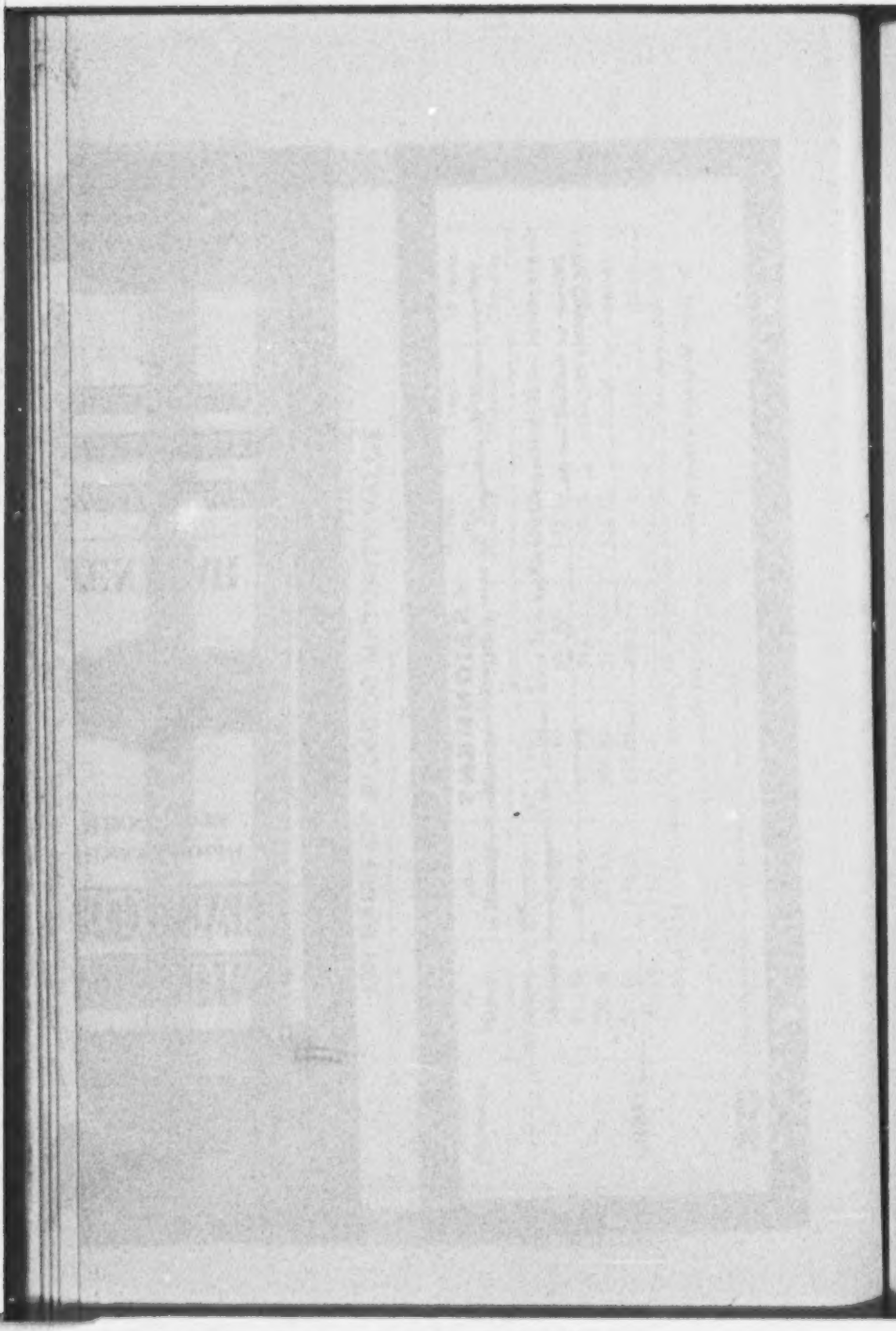
_____ _____ *(SEAL)*

This Assignment will not be valid until approved by the Company and a transfer fee of $1.00 is paid.

The above Assignment is approved this _____ day of _____ 19____

_____
PRESIDENT.

_____
SECRETARY.



[fols. 48-51] IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

OPINION—Filed Aug. 18, 1931

PRAY, D. J.:

This is a suit in equity brought by Plaintiff against defendant as Auditor and ex officio Investment Commissioner of the State of Montana seeking injunctive relief against threatened cancellation of a permit to do business in this state, regularly issued by the latter to the former under the Blue Sky Law.

Plaintiff was incorporated under the laws of Minnesota in 1894 and authorized to engage in the business of selling certain investment certificates in that state and elsewhere; it has been so engaged in business in the State of Montana continuously since January 1930 under such permit. According to the terms of the investment certificate payment in a certain sum to the holder thereof is to be made at the expiration of the time stated therein, providing the holder makes the required payments during a certain period of years. The form of certificate was approved by the Investment Commissioner. Section 4036 of the Revised Codes of Montana, authorizing the issuance of the permit reads as follows:

"It shall be the duty of the investment commissioner to examine the statements and documents so filed, and if said investment commissioner shall deem it advisable, he shall make or have made a detailed examination, audit or investigation of such investment company's affairs; providing, that such investment company may at its option, in writing, refuse to have such investigation made, in which event said investment commissioner shall reject its application. If he finds that such investment company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business, and proposed contracts contain and provide for a fair, just, and equitable plan for the transaction of business, and in his judgment promises a fair return on the stocks, bonds, or other securities by it offered for sale, the investment com-

mission shall issue to such investment company a statement entitling it to sell such securities in the state of Montana, and reciting that such company has complied with the provisions of this act, that detailed information in regard to [fol. 52] the company and its securities is on file in the investment commissioner's office, and that such investment company is permitted to do business in this state; and such statement shall also recite in bold type that the investment commissioner in nowise recommends the securities to be offered for sale by such investment company. Such permit, however, shall be subject to revocation at any time by the investment commissioner for cause to him sufficient. But if said investment commissioner finds that such articles of incorporation or association, charter, constitution, and by-laws, plan of business, or porposed contract contain any provision that is unfair, unjust, inequitable, or oppressive to any class of contributors, or if he decides from his investigation or examination of its affairs that said investment company is not solvent, or does not intend to do a fair and honest business, or in his judgment does not promise a fair return on stocks, bonds, or other securities by it offered for sale, then he shall not grant such company a permit as herein provided, and shall notify said company in writing of his decision."

June 22nd, 1931, the Investment commissioner issued an order, addressed to this plaintiff, and other investment companies doing business in Montana, which is as follows:

"It is therefore ordered that from and after the 22nd day of July, 1931, the following rule shall be in full force and effect: In the interests of the investing public, any investment company operating in the State of Montana shall not issue, sell or distribute, any bonds, certificate of indebtedness, collateral trust certificates or any other device whatsoever, that might be deemed a security creating a debtor-creditor relationship, which has a withdrawal privilege, before maturity, that does not provide for withdrawal of installments paid thereon due any time after the first year, if the owner or holder shall have given ninety (90) days notice in writing of his intention to make such withdrawal and such owner or holder shall be entitled to receive the total amount of all installments paid in, less only a with-

drawal penalty not exceeding three and one-half (3½) per cent of the matured or face value of such securities, plus interest compounded annually, at the rate at which said securities are guaranteed to mature or represented to pay at maturity; and provided further, that the bond or contract representing such security and the application for the same shall have printed thereon, the amount paid in, the withdrawal or surrender value thereof, and the loan value at the end of each year of its duration.

It is further provided that none of the above securities as enumerated shall be permitted to be sold in the State of Montana unless there is a withdrawal privilege provided each year beginning with the first year until maturity.

Dated at Helena, Montana, this 22nd day of June, 1931.

Geo. P. Porter, State Auditor and ex Officio Investment Commissioner."

That the for-going order is based upon a certain preamble or so-called "Findings" of the Investment Commissioner in the following language:

"1. The Commissioner maintains that Section 4043 of the Revised Codes of Montana, 1921, confers authority for [fol. 53] the promulgation of the proposed rule in the following language: "* * * The Investment Commissioner shall have general supervision and control, as provided by this act, over any and all investment companies and stock brokers, domestic or foreign, licensed under this act."

2. The Commissioner believes that the provisions of Section 4036, Revised Codes of Montana, 1921, providing in part: "* * * Such permit, however, shall be subject to revocation at any time by the Investment Commissioner for cause to him sufficient." clearly gives the Commissioner authority to cancel permits.

3. That the above mentioned provision of law impliedly gives to the Commissioner the right to impose a lesser penalty, namely, the removal of all unfair provisions in contracts.

4. That Section 4045 of the Revised Codes of Montana, 1921, provides in part as follows: "Revocation of permits and appointment of receiver. Whenever, it shall appear to the investment commissioner that the assets of any in-

vestment company doing business in this state are impaired to the extent that such assets do not equal its liabilities, or that it is conducting its business in an unsafe, inequitable, or unauthorized manner, or is jeopardzing the interests of its stockholders or the investors in stocks, bonds or other securities by it offered for sale, or whenever any investment company shall refuse to file any papers, statements, or documents required under this Act, or shall refuse to permit an examination by said investment commissioner, or his deputies or agents, as provided, in this act, without giving satisfactory reasons therefor, said investment commissioner shall at once cancel its permit. * * *" The Commissioner believes that a loading charge of from 5% to 8% is highly inequitable as this term is defined in this section.

5. That it is unreasonable and inequitable to maintain that investment companies who were operating in Montana prior to the enactment of the present investment act should not be amenable to the same reasonable and lawful supervision and control by this Commissioner as exercised on companies coming under his supervision at a later date.

6. That this Commissioner is continually receiving complaints to the effect that agents of investment companies misrepresent to prospective purchasers either by not stating the provisions relating to withdrawals or by alleging that investors can procure their money at any time.

7. That in justice to the investing public, during the period of depression, they should not be unreasonably penalized for conditions beyond their control, caused by unemployment or depreciation of commodity values.

8. That the proposed rule is a reasonable one as evidenced by its adoption by certain of the investment companies operating in this state and by testimony produced at the hearing.

9. That a maximum withdrawal penalty of 3½% is amply sufficient in case of forfeiture of investment installment contracts and that withdrawals should be permissable at any time after one year.

Plaintiff filed an annual statement for 1930 showing assets in excess of five million dollars, paid the required fee,

and furnished such information to the Investment Commissioner as was required by him, and otherwise seems to have complied with the law. By the bill it appears that plaintiff has 20 agents in Montana duly licensed by the de- [fol. 54] fendant to sell said certificates. That in 1930 plaintiff sold in Montana certificates of the maturity value of $2,141,200.00, to approximately 4500 persons; that its right to do business in this state is of a value largely in excess of $3000.00 and that if it is compelled to comply with such order it will result in unjust and unfair discrimination between present and future holders of such certificates, and disrupt and destroy plaintiff's business and compel it to retire from the state.

The principal contentions of plaintiff, are that section 4036 Revised Codes of Montana, 1921, which authorizes the revocation of a permit "at any time by the Investment Commissioner for cause to him sufficient," and the provision of Section 4045, which authorizes the cancellation of a permit whenever it appears to the investment commissioner that the permittee is conducting its business in an inequitable manner, are in violation of the due process of law clause of the 14th amendment to the Constitution of the United States for failure to provide for notice and opportunity for hearing; and for the further reason that no rule or standard is fixed for determining what is a sufficient cause or when the business is being conducted in an inequitable manner.

No question that plaintiff is a person within the meaning of the due process of law clause of the 14th Amendment, and that its right under the permit to do business in this state is property and entitled to protection when subjected to control of a state law in conflict therewith. Liggett Co. vs. Baldridge, 278 U. S. 105. And that the right to enter into the contract approved by the investment Commissioner, and concerning which the permit to do business was issued, is likewise protected under the 14th amendment. Tyson & Bros. vs. Banton, 273 U. S. 418.

Although in this case a hearing was in fact accorded plaintiff, the Blue Sky Law itself, which was relied upon by the Investment Commissioner, makes no provision for notice or opportunity to be heard. "If the statute did not [fol. 55] provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been

given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute." Coe vs. Armour Fertilizer Works, 237 U. S. 413, Citing Stewart vs. Palmer, 74 N. Y. 183, 188, 30 A. Rep. 289, involving the validity of a statute assessing the expense of a local improvement upon the land benefitted without notice to the owner. According to the weight of authority, although the owner may have been given notice and even a hearing, indicating a desire for fair play on the part of the officer, that is not sufficient to satisfy the constitutional requirement unless the right to such notice and hearing is embodies in the statute. National Automobile Service Corporation vs. Barford, 137 Atl. (Penn.) 601; Garfield vs. U. S. ex rel. Goldsbay, 211 U. S. 249; C. M. & St. P. Ry. Co. vs. Board of Railroad Commissioners, 76 Mont. 305; Counsel for defendant admit that the original act in question "did not provide specifically for notice to the company by the investment Commissioner on revocation of permits, and no appeal was given to the courts in such cases. The act was open to serious question as to its due process provisions." They now claim in view of the Amendments to Section 4038 as contained in Chapter 194 of the laws of 1931 that the language of the original act has been changed to allow recourse to the courts. Defendant then quotes the original act as follows:

"An appeal may be taken from the decision of the investment commissioner refusing to grant a license to any investment company or stock-broker, to the state board of examiners of this state. Such appeal shall be taken by filing with said state board of examiners an application for a hearing on its case."

The amendment was then quoted as follows:

"Any interested person, who has appeared, copartnership, association or corporation being dissatisfied with any finding, findings or decision of the Commissioner made in accordance with the provisions of this Act, may within thirty days from the making thereof, commence an action in any court of competent jurisdiction against said Commissioner as defendant, to vacate and set aside said find-

[fol. 56] ing, findings or decision on the ground that the said findings or decision are unjust or unreasonable. The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the district courts of this state and on the hearing the Judge of said court may set aside, modify or confirm said findings or decision as the evidence and the rules of equity may require."

Defendant next contends that while it is true that due process of law is not provided for one who has not appeared before the investment commissioner the plaintiff is not in that class "because they have appeared and belong to a class for which due process is provided * * * and even though as to some classes the statute might be held void, it can not be held void as to plaintiff." In reply plaintiff calls attention to a proviso, ommitted by defendant, which is a part of the amendment of Section 4038 and is in the following language:

"Provided, however, that the original application with reference to which an appeal is herein provided for shall not be heard by the Investment Commissioner until notice of hearing on the same has been published in some newspaper published at the capital city daily, in at least seven issues of such paper, and provided further, that upon such hearing on the original application, any person, co-partnership, association or corporation interested in or opposed to said application may appear."

On reading the original act in connection with the amendment, and especially with the proviso, it seems quite clear that recourse to the courts is not limited to an applicant whose application for a permit has been refused by the commissioner. This wording of the proviso: "Provided, however, that the original application with reference to which an appeal is herein provided for shall not be heard by the Investment Commissioner until notice of the hearing of the same has been published * * *", evidently does not mean that the specific and comprehensive terms of the amendment proper are to be limited by this proviso to a dissatisfied applicant for a license; that language is merely descriptive of the original application "with reference to

which an appeal is herein provided", as in the instance of "any interested person, who has appeared, co-partnership, association or corporation being dissatisfied with any finding, findings or decision of the commissioner made in accordance with the provisions of this Act * * *."

[fol. 57] But notwithstanding this concession to defendant in the interpretation of the amendment it still appears that the law itself as amended does not provide for notice or opportunity for hearing before the permit is revoked, and furthermore, that the decision shall stand, in full force, until an action is commenced and prosecuted to judgment, when the Judge "may set aside, modify or confirm said findings or decision * * *." It would seem that the guaranty of the 14th amendment is challenged when an order is made by the commissioner based upon the statute as amended, revoking a license or permit without notice or hearing to be in effect pending the test of its validity by the court.

Prendergast vs. New York Ill. Co., 262 U. S. 43;
Love vs. Atchison, T. & S. F. Ry. Co. 185 Fed. 321.
C. M. & St. P. R. Co. vs. State of Minn. 134 U. S. 418.

As to the second objection that no rule or standard is provided to determine when a sufficient cause exists or when the business is being conducted in an inequitable manner, the Supreme Court held in U. S. vs. Cohen Grocery Co., 255 U. S. 81, in passing on the constitutionality of the "Lever Act", as follows:

"The sole, remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, 'That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the trans-

action as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction finds abundant demonstration in the cases now before us; since in the briefs in these cases the conflicting results which have arisen from [fol. 58] the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. As illustrative of this situation we append in the margin a statement from one of the briefs, on the subject. And again, this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution."

It would seem that the acts threatened by the Investment Commissioner would deprive plaintiff of his property without due process of law on either ground alleged. In the instant case the officer is required to exercise legislative power when he sets up a standard and undertakes to say when a business is being conducted in an inequitable manner. Suppose he were directed by the statute to determine when the price of a commodity charged was unreasonable or excessive, or when it was not necessary to provide a reasonable profit, with no directions or standard to go by; would it not be less complicated than to require him to determine when a business is being conducted in an inequitable manner with no standard in the law as a guide?

It seems to be generally understood that the main object of the socalled Blue Sky Laws is the prevention of fraud. The police power exercised by the legislature does not go to the extent of regulating or prohibiting the sale of securi-

ties or making of contracts based upon the judgment of an investment commissioner or board attempting to insure the public a fair profit on the investment. Nor would the law stand the test if it prohibited such dealing in securities as in the judgment of the commissioner rested upon a plan of organization or conduct of business which was not "fair". Ala. & N. O. Trans. Co. vs. Doyle, 210 Fed. 173. In this case a statutory three judge court held unconstitutional the Blue Sky Laws of Michigan, as violative of the due process clause of the 14th amendment. Later another law of like character was enacted in the same state which was attacked in the same manner, wherein it was declared that the purpose of the act was not the prevention of fraud but to protect the investing public against financial loss, but the Supreme Court held that the purpose of the statute was to [fol. 59] protect investors not from financial loss generally but from fraud. Merrick vs. N. W. Halsey & Co., 242 U. S. 568.

Many authorities are cited by plaintiff to show that it is a delegation of legislative power to authorize the Investment Commissioner to prescribe the terms and provisions of contracts for investment companies. Section 4036, authorizing the Investment Commissioner to revoke a permit "for cause to him sufficient" should be considered in connection with Section 4045; a cause sufficient to the commissioner must be one of the grounds provided in Section 4045. The securities offered for sale had been approved by the Commissioner. Conducting the business in an inequitable manner would necessarily relate to offering the securities for sale and there is nothing in the case to show deception, misrepresentation or fraud.

In Hall vs. Geiger-Jones Co., 242 U. S. 539, 61 L. Ed. 480, involving the Blue Sky Law of Ohio, the Court held:

"It will be observed, therefore, that the law is a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties, or other repressive measures. The name that is given to the law indicated the

evil at which it is aimed; that is, to use the language of a cited case, "speculative schemes which have no more basis than so many feet of 'blue sky';" or, as stated by counsel in another case, "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations." Even if the descriptions be regarded as rhetorical, the existence of evil is indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government, and that the appreciation of the consequences of it is not open for our review."

Counsel for plaintiff point to the Journal of the last legislative Assembly of Montana, giving the history of "Substitute House Bill No. 182," which failed of passage, as evidence of the intent of the Legislative Assembly that such order of the Investment Commissioner, here in question, should not be authorized. But it seems unnecessary to enter into discussion of questions other than those already considered.

[fols. 60 & 61] Therefore the Court having considered the pleadings, counsel's arguments and briefs submitted, and being duly advised, it is ordered and decreed that the defendant, his employees, agents and representatives be and they are, hereby enjoined from enforcing against the plaintiff herein the threatened order set forth in plaintiff's Bill of Complaint, and furthermore in the opinion of the court the law upon which the foregoing order is based, for the reasons given and to the extent herein above set forth, is violative of the due process of law clause of the 14th amendment to the Constitution of the United States and is therefore void.

Sawtelle, C. J., concurs.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

DISSENTING OPINION—Filed Aug. 18, 1931

BOURQUIN, D. J.:

The case is practically all fours with the Hall, Caldwell and Merrick cases, 242 U. S. 539, 559, 568.

In all, are involved Blue Sky Laws alike in all material particulars; in all, like objections were made; and in all those cited, the Supreme Court (8 to 1) reversed the lower tribunals and upheld the laws. Although the personnel of the Court has largely changed and the "presently approved doctrine" may have likewise (See Ferrall's Case, 257 U. S. 533; the Great Falls Case, 39 Fed. (2) 177, 180), those cases are to be followed until reversed by the minority again become the majority. It is true the law in the Hall case provides for notice before cancellation and this at bar does not, but that is immaterial so far as due process goes; for no hearing was allowed and the notice was an idle gesture and sheer futility. It must be remembered that the commissioner's power to prescribe conditions and to cancel permits for breach of them is administrative, delegated by the legislature, and partakes of legislative rather than judicial quality (See Louis Co. v. Garrett, 231 U. S. 318). He can do what the legislature might do, his order is law as though by the legislature made, and as it might create conditions and cancel permits without notice and hearing (Compare the National Council Case, 203 U. S. 163), so may he; in either case due process being afforded by [fol. 63] judicial review which in itself is notice and hearing. The principle which distinguishes due process in legislative proceedings from the like in judicial proceedings, is that in the former, action followed by notice and hearing in judicial review is due process; in the latter, action must be preceded by notice and hearing to be due process. The cases more or less vaguely will be found to follow this rule.

The Minnesota Rate Case, 134 U. S. 418 illustrates it, the court concluding that although the statute authorized the commission without notice or hearing to fix rates, it would be valid if the state court would construe it to permit judicial review. And see Vandalia Co. v. Com. 242 U. S. 260. In any case is the right to judicial review on constitutional grounds, implied if not expressed. See Plymouth Co. v. Penn. 232 U. S. 547; Merrick's Case, 242 U. S. 590; Dayton etc. Co. v. U. S. 263 U. S. 485, 486. Where property alone is involved, judicial review after action, satisfies due process. See Phillips' Case, 283 U. S. —. And here and now plaintiff has judicial review of the order. Compare the Ben Avon Case, 253 U. S. 294. In the matter of standards, the Hall and companion cases cited, are equally conclusive.

See also
Mutual Corp. vs. Com. 236 U. S. 245;
U. S. vs. Grimand, 220 U. S. 517;
Union vs. U. S., 204 U. S. 364;
U. S. vs. Co. 282 U. S. 324.

Multitudes of commissions, federal and state, are vested with more or less power to do what legislatures might do, to stipulate conditions and determine standards of quality, value, reasonableness, etc., for purposes of business and regulation, therein unquestioned or assailed in vain. Of course until a standard is prescribed, it is mere conjecture, the statute binds no one and invokes no penalties.

See
Cohen's Case, 255 U. S. 81;
Cline's Case, 274 U. S. 445.

Investment companies like banks are clothed with sufficient public interest to warrant regulation "to stop rat holes", whether or not is "wisdom in trying to save the [fol. 64] ignorant and rash from folly" of alluring contracts, says Mr. Justice Holmes in Dillingham's Case, 264 U. S. 372, 373. The limit of regulation is reason and the state's to determine. As rates, interest, compensation, wages and the like may be by the state prescribed, no reason is perceived why the "loading charge" (to unload?) or quassi forfeiture in plaintiff's contracts may not be.

They provide that on payment to it of $370 annually in advance for ten years, plaintiff will return $5000; and that the buyer may withdraw after two payments and eighteen months, receiving $210 of the $740 he has paid, the plaintiff retaining $530. Likewise, at later periods, though the return gradually increasing.

The defendant conceiving the quassi forfeiture too great and inequitable, made the order involved that withdrawal be permitted after one year, the buyer to receive all paid plus the guaranteed interest less 3½% of the amount due at maturity. Thus, if the right be exercised promptly at the end of the year, of the $370 paid plus said interest, the buyer would receive $215.35, the plaintiff retaining $175. The statute authorizing defendant to determine whether the "plan" is "fair, just and equitable", and if "inequitable" to cancel permits, his finding that plaintiff's plan is in-

equitable, his order prescribing an equitable standard and condition, and his cancellation of permits of those who breach the condition, all are within the power of the legislature and to defendant delegated, are reasonable, supported by sufficient legal evidence, and consistent with the guarantees of the 14th Amendment.

High-pressure salesmen like hungry locusts swarm the country side, peddling so-called securities which in the [fol. 65] indicated quality are too often comparable to a lien on a flock of wild geese. Their methods are well known. Often the very paper they sell is given some resemblance to government bonds or greenbacks. Their impressive names, the installment plan, the interest higher than paid by banks, and other alluring features, representations, hopes and fears by the salesmen urged, made and excited, may induce ill-considered purchases by those of small means who too often soon regret or are unable to complete. Regulation to diminish their losses well might go to the full return made by banks on withdrawal. Liberty to contract is not a privilege to plunder, and in necessity yields to the police power in behalf of the general welfare.

Union etc. Co. vs. Corp. 248 U. S. 375;
O'Gorman's Case, 282 U. S. 251.

Even existing contracts of future performance may be affected, since "the operation of reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future".

Dillingham's Case, 264 U. S. 374.

Regulation comes on apace or like a flooding tide. Those who kick against the pricks are opposing with weak and flimsy brooms. Even courts grow sensitive to the ground swells.

It is said that Chief Justice White admitted that "in my time we relaxed constitutional guarantees from fear of revolution", and that Chief Justice Taft declared that "at a conference I announced 'I have been appointed to reverse a few decisions', and", with his famous chuckle, "I looked right at old man Holmes when I said it". What a pity were these illuminating incidents lost to history save in so far as the court's reports will verify them.

The trend of the age is again "liberal", however much abused the term or like charity it may cover, and we are on

our way whether or not we know where we are going or [fols. 66 & 67] what we will do when we get there. But so far as regulation is concerned, like it or not, wise or not, it is a fair prophecy that, in classic phrase of the day, "folks, you haint seen nothin' yit".

Decree should go for defendant.

[File endorsement omitted.]

[fols. 68-72] IN UNITED STATES DISTRICT COURT

(Title of Court and Cause)

FINAL DECREE—Filed Aug. 20, 1931

This cause came on to be heard at this term, before the Court—The Honorable William A. Sawtelle, Circuit Judge, the Honorable George M. Bourquin and the Honorable Charles N. Pray, District Judges, presiding—and was argued by counsel; and thereupon said cause having been submitted for final decision upon consideration thereof, it was ordered, adjudged and decreed, as follows, namely: That the order made and issued by the defendant, as Investment Commissioner of Montana, complained of, and a copy of which is made a part of the bill of complaint, is invalid, and that the defendant and all persons acting in aid or assistance of him, be and they are hereby perpetually enjoined from enforcing said order against said plaintiff, and from commencing and prosecuting any action, or proceeding, against said plaintiff, or from revoking or cancelling plaintiff's permit to do business in Montana, because of failure of plaintiff to comply with said order.

Dated this 19th day of August, 1931.

Bourquin, District Judge, for the Court.

The Clerk will enter.

Bourquin, J.

[File endorsement omitted.]

[fol. 73] IN UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA

In Equity. No. 1190

INVESTORS SYNDICATE, a Corporation, Plaintiff,

vs.

GEORGE P. PORTER, Auditor and ex Officio Investment Commissioner of the State of Montana, Defendant

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Nov. 13, 1931

Comes now George P. Porter, Auditor and ex officio Investment Commissioner of the State of Montana, defendant in the above entitled cause and files the following assignments of error upon which he will rely upon the prosecution of the appeal herewith petitioned for in said cause from the final order, injunction and decree made and entered in the above entitled court and cause on the 20th day of August, 1931.

I

The bill of complaint does not state facts sufficient to constitute a valid cause of action in equity or at all.

II

The United States District Court for the District of Montana erred in holding that code sections 4043, 4036 and 4045, Revised Codes of Montana, 1921, and Chapter 194 of the Session Laws of 1931 (Blue Sky Laws) are void as violative of the due process clause of the Fourteenth Amendment to the Federal Constitution in that the law, itself, makes no [fol. 74] provision for notice or opportunity for hearing by an investment company whose license the investment commissioner may be threatening to revoke.

III

The United States District Court for the District of Montana erred in holding that the guaranty of the due process clause of the Fourteenth Amendment to the federal constitution is challenged when an order is made by the com-

missioner, based upon the above mentioned Blue Sky Laws, and with or without actual notice revoking a license or permit, such order to be in effect pending the test of its validity by the court.

IV

The United States District Court for the District of Montana erred in holding that the Montana Blue Sky statutes and threatened procedure of the defendant are violative of the due process clause of the Fourteenth Amendment to the federal constitution in that no rule or standard is provided in such statutes to determine when sufficient cause for revocation of a license exists or when a given business is being conducted in an inequitable manner.

V

The United States District Court for the District of Montana erred in holding that the Montana Blue Sky statutes violate Section 1 of Article V of the constitution of Montana in that they require the defendant to exercise legislative power and to, himself, set up a legislative standard when he undertakes to say whether a certain business is being conducted in an inequitable manner.

VI

The United States District Court for the District of [fol. 75] Montana erred in holding that the Montana Blue Sky laws are violative of the Fourteenth Amendment to the federal constitution (privileges and immunities clause) in that the police powers which may be exercised by the legislature of a state do not permit them to regulate the sale of securities or the making of contracts, such regulations to rest in the judgment of the investment commissioner of the state as to whether or not such sales or contracts are equitable.

VII

The United States District Court for the District of Montana erred in enjoining the defendant from enforcing his order as against the plaintiff, such order being that it conform to rules promulgated by the commissioner with reference to forfeiture clause and investment contract.

VIII

Wherefore defendant prays that said injunction decree and order be reversed and set aside and for such other and further relief as to the court may seem just and proper.

Dated at Helena, Montana, this 10th day of November, 1931.

L. A. Foot, Attorney General for the State of Montana; T. H. MacDonald, Assistant Attorney General of the State of Montana; Freeman, Thelan & Freeman, Attorneys for Defendant and Appellant, Residing at Helena, Montana. J. W. Freeman, J. N. Thelan, J. P. Freeman.

[fols. 75½ & 76] [File endorsement omitted.]

[fols. 77-84] In United States District Court

(Title of Court and Cause)

Order Allowing Appeal—Filed Nov. 13, 1931

On motion of L. A. Foot, Attorney General of the State of Montana, and T. H. MacDonald, Assistant Attorney General of the State of Montana, counsel for defendant and appellant, it is hereby ordered that an appeal to the Supreme Court of the United States from the injunction, decree and order heretofore filed and entered herein on August 20, 1931, be and the same is hereby allowed and that transcript of the record, testimony, exhibits, stipulations and all proceedings duly authenticated be forthwith transmitted to the Supreme Court of the United States in accordance with the rules of such court in such cases made and provided.

It is further ordered that the bond on appeal be fixed at the sum of $1000.

Dated at Great Falls, this 13th day of November, 1931.

Charles N. Pray, U. S. Dist. Judge.

[File endorsement omitted.]

[fol. 85] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Jan. 23, 1932

The transcript of record in the above entitled action having been filed, appellant makes the following statement of points on which he intends to rely in the premises and designates the part of the record herein which he deems necessary for the consideration of his appeal as follows, to-wit:

I

(1) The bill of complaint does not state facts sufficient to constitute a valid cause of action in equity or at all.

(2) The United States District Court for the District of Montana erred in holding that code sections 4043, 4036 and 4045, Revised Codes of Montana, 1921, and Chapter 194 of the Session Laws of 1931 (Blue Sky Laws) are void as violative of the due process clause of the Fourteenth Amendment to the Federal Constitution in that the law, itself, makes no provision for notice or opportunity for hearing by an investment company whose license the investment commissioner may be threatening to revoke.

(3) The United States District Court for the District of [fol. 86] Montana erred in holding that the guaranty of the due process clause of the Fourteenth Amendment to the federal constitution is challenged when an order is made by the commissioner, based upon the above mentioned Blue Sky Laws, and with or without actual notice revoking a license or permit, such order to be in effect pending the test of its validity of the court.

(4) The United States District Court for the District of Montana erred in holding that the Montana Blue Sky statutes and threatened procedure of the defendant are violative of the due process clause of the Fourteenth Amendment to the federal constitution in that no rule or standard is provided in such statute to determine when sufficient cause for revocation of a license exists or when a given business is being conducted in an inequitable manner.

(5) The United States District Court for the District of Montana erred in holding that the Montana Blue Sky stat-

utes violate Section 1 of Article V of the constitution of Montana in that they require the defendant to exercise legislative power and to, himself, set up a legislative standard when he undertakes to say whether a certain business is being conducted in an inequitable manner.

(6) The United States District Court for the District of Montana erred in holding that the Montana Blue Sky Laws are violative of the Fourteenth Amendment to the federal constitution (privileges and immunities clause) in that the police powers which may be exercised by the legislature of a state do not permit them to regulate the sale of securities or the making of contracts, such regulations to rest in the judgment of the investment commissioner of the state as to whether or not such sales or contracts are equitable.

[fol. 87] II

Appellant designates the following parts of the record as necessary for printing and for the consideration of this Court:

1. Bill of Complaint (Record 2).
2. Amendments to Bill of Complaint (Record 18).
3. Answer to Bill of Complaint (Record 24).
4. Minute Entry of Clerk (Record 44).
5. Majority Opinion (Record 51).
6. Minority Opinion (Record 62).
7. Decree and Order for Injunction (Record 68).
8. Order Allowing Appeal (Record 77).
9. Assignments of Error (Record 73).

—— ——, Attorney General for the State of Montona; —— ——, Assistant Attorney General for the State of Montana, Attorneys for Defendant and Appellant. —— ——, Attorneys for Plaintiff and Appellee.

[fol. 87a] Due personal service of within statement made and admitted and receipt of copy acknowledged this 19th day of January, 1932.

M. S. Gunn, Attorney for Appellee.

[fol. 87b] [File endorsement omitted.]

[fols. 88 & 89] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED—Filed Jan. 26, 1932

To the Clerk of the above-entitled Court:

Investors Syndicate, appellee, hereby designates the following additional parts of record as necessary for the consideration of the points on which appellant intends to rely as per statement of points filed, to-wit: Copy of letter and certificate introduced by plaintiff and appellee as part of the stipulation referred to in the minute entry.

Dated at Helena, Montana, this 22nd day of January, 1932.

(M. S. Gunn) M. S. Gunn, One of Counsel for Appellee.

[fol. 90] [File endorsement omitted.]

Endorsed on cover: File No. 36,441. Montana D. C. U. S. Term No. 627. George P. Porter, Auditor and ex-officio Investment Commissioner of the State of Montana, appellant, vs. Investors Syndicate. Filed January 11, 1932. File No. 36,441.

No. 627

FEB
CHARLES

In the Supreme Court

OF THE

United States

.....Term, 1932

GEORGE P. PORTER, Auditor and ex officio Investment Commissioner of the State of Montana,

Appellant,

vs.

INVESTORS SYNDICATE, a corporation,

Appellee.

STATEMENT OF BASIS OF APPELLATE JURISDICTION

L. A. FOOT,
Attorney General of the State of Montana.
T. H. MacDONALD,
Assistant Attorney General of the State of Montana.

Attorneys for Appellant.

In the Supreme Court

OF THE

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.....Term, 1932

No.....

GEORGE P. PORTER, Auditor and ex officio Investment Commissioner of the State of Montana,

Appellant,

vs.

INVESTORS SYNDICATE, a corporation,

Appellee.

STATEMENT OF BASIS OF APPELLATE JURISDICTION

Pursuant to Supreme Court Rule No. 12, paragraph 1, the appellant above named files this his statement showing the basis on which he contends that the Supreme Court has appellate jurisdiction

to review on appeal the injunction order and decree appealed from herein, as follows:

I. The statutes believed to sustain appellate jurisdiction are Sections 238 and 266 of the judicial code, as amended, (28 U. S. C. Sec. 345 (3) and 380).

II. The final decree and order of injunction appealed from were entered on the 20th day of August, 1931, as appears from page 68 of the certified transcript on appeal on file herein.

III. The application for appeal was presented on the 13th day of November, 1931, as appears from pages 70 and 77 of the certified transcript.

IV. The appeal herein is from a final decree and order of injunction (R. page 68) granted by a majority of two of a three judge statutory court (R. page 22) convening under the provisions of Section 266 of the judicial code as amended (28 U. S. C. 380) restraining the appellant auditor and ex officio investment commissioner of the State of Montana from carrying out the provisions of an order made by him in his official capacity as investment commissioner of the State of Montana, directing the appellee to conform to certain requirements with reference to its investment certificate as provided by Sections 4043, 4036 and 4045 of the Revised Codes of Montana of 1931. (See majority opinion R. page 51.) The injunction was granted on the following grounds, to-wit:

"That the guaranty of the Fourteenth Amendment (federal constitution) is challenged when an order is made by the commissioner (appellant) based upon the statute (aforesaid Montana statute) as amended, revoking a license or permit even with notice and hearing such revocation to be in effect pending the test of its validity by the court," (R. page 73) and that the acts threatened by the investment commission (appellant) would deprive the appellee of his property without due process of law as provided for in the Fourteenth Amendment to the federal constitution because the legislature set up no rule or standard to determine when a sufficient cause exists for the revocation of a certificate by the investment commissioner and no standard as to when a business is being conducted in an inequitable manner.

The opinion was written by Hon. Charles N. Pray, District Judge, concurred in by Sawtelle, Circuit Judge, dissented from by Bourquin, District Judge (R. page 84).

Application for interlocutory injunction was made, together with a request for a three judge court (R. page 22) but the matter was submitted to a three judge court for final decision (R. page 44). The matter was submitted on the Bill of Complaint (R. page 18), Answer thereto (R. page 24) and Stipulations as to the record (R. page 82).

Dated at Helena, Montana, this 20th day of January, 1932.

Respectfully submitted,

L. A. FOOT,

Attorney General of the State of Montana.

T. H. MacDONALD,

Assistant Attorney General of the State of Montana.

Attorneys for Appellant, residing at Helena, Montana.

J. C. FREEMAN,

Great Falls, Mont.

Service of a copy of the above statement is hereby admitted this.....day of January, 1932.

.....

.....

Attorneys for Appellee, residing at.....

No. 627

FILE COPY No. 1190

APR 16

In the Supreme Court

OF THE

United States

October Term, 1931

GEORGE P. PORTER, State Auditor and ex officio Investment Commissioner of the State of Montana,

Appellant,

vs.

INVESTORS SYNDICATE, a corporation,

Appellee.

BRIEF OF APPELLANT

Appeal from the District Court of the United States, in and for the District of Montana.

L. A. FOOT, ESQ.,
Attorney General,
T. H. MacDONALD, ESQ.,
Assistant Attorney General,
Helena, Montana,
JAMES W. FREEMAN, ESQ.,
Great Falls, Montana,
Attorneys for Appellant.

Filed, April....., 1932.

.....Clerk

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In the Supreme Court

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October Term, 1931

No. 1190

GEORGE P. PORTER, State Auditor and ex officio Investment Commissioner of the State of Montana,

Appellant,

vs.

INVESTORS SYNDICATE, a corporation,

Appellee.

Appeal from the District Court of the United States, in and for the District of Montana.

APPELLANT'S BRIEF

This is an appeal under Section 266 of the Judicial Code, as amended, (28 U. S. C. 380) from an order of the District Court of the United States, in and for the District of Montana, enjoining the enforcement of an order of the State Auditor and ex officio Investment Commissioner of Montana, which order required all "Investment Companies" to provide in their contracts that

the "Purchaser of its Investment Certificates" might withdraw all amounts paid in by him, at his option at any time after the end of a year, less only a forfeiture of three and one-half (3½%) per cent of the face value of the certificate, that is $35.00 on an investment ceritficate for $1,000.00.

OPINION

The opinions of the three judge court are set forth in 52 F. (2d) 189.

STATEMENT OF THE CASE

Plaintiff is a Minnesota corporation engaged in the business of selling Investment Certificates, which may be described as certificates which the purchaser pays for, in installments and at the end of a given period, e. g., ten years, on the surrender of his certificate receives the face value of the certificate, e. g., $1,000.00.

The certificate is supposed to return its owner five and one-half (5½%) per cent interest compounded on all installments paid at maturity. The form of certificate in use by plaintiff (R. p. 13) causes the purchaser to forfeit all payments made during the first eighteen months in case he defaults in payments. After eighteen months, and after payment of $148.00 on a $1,000.00 certificate, ($111.00 if paid in installments) (all certificates will hereafter be treated, for convenience, as $1,000.00 certificates), he may receive on surrender of his certificate $42.00,

forfeiting $106.00, or $69.00. After four years and payment of $370.00 (or $296.00) he may close the books and draw $254.00, forfeiting $116.00 (or $42.00) and his interest. Not in any event until he has paid in for five years can be get back his payments in full.

The certificate is drawn on the basis of payment of five and one-half (5½%) per cent interest.

Plaintiff was first licensed by the Investment Commission of Montana in 1930 (R. p. 2) and was then selling a certificate substantially though not exactly the same as at the time of the order hereinafter referred to—has over twenty-two agents selling its certificates—and sold over $2,141,200 face value of such certificates in Montana in 1930. It sells the same form of certificate in thirty-five other states and provinces of Canada (R. p. 7).

The defendant is the Investment Commissioner of Montana. Section 4043, Revised Codes of Montana, provides:

> "* * * The Investment Commissioner shall have general supervision and control, as provided by this act, over any and all investment companies and stock brokers, domestic or foreign, licensed under this act."

Defendant is given the power to revoke permits of investment companies in Montana (Section 4045, R. C. M., 1921) when such a company is

"conducting its business in an unsafe, inequitable or unauthorized manner."

On May 7, 1931, the Investment Commissioner served notice on defendant with a number of others to attend a hearing relative to the promulgation of the rule in question in this case.

Plaintiff appeared by his vice-president and Mr. M. S. Gunn of counsel and voiced plaintiff's objection to the rule as appears by the following quotation taken from the Commissioner's statement accompanying the Order and set forth as an exhibit in the Answer (Tr. p. 19):

BEFORE GEO. P. PORTER, STATE AUDITOR AND EX OFFICIO INVESTMENT COMMISSIONER

Hearings held May 23 and June 1, 1931, at the State Capitol Building, Helena, Montana. The following appearances were made:

Investors Syndicate and Installment Securities Agency, Incorporated, H. W. Berg, Vice-President and M. S. Gunn, Counsel.

Universal Bond and Mortgage Company, Paul Hudtloff, Vice-President, H. J. Fennimore, Director and Frank Venable, Montana Manager.

International Guaranty Thrift Corporation, F. M. Zimmers, President.

Great Western Bond & Mortgage Corporation—by written record.

Decker Mortgage Company—no appearances.

National Thrift Corporation of America—no appearances.

National Bond Corporation, R. M. Tone, President.

National Mortgage Bond Corporation of Montana—no appearances.

United Bond and Finance Corporation, Guy M. Miller, State Manager and Earle Genzberger, Counsel.

The corporations cited to appear in this action were all engaged in selling in Montana installment certificates, bonds and other securities creating a debtor-creditor relationship on the installment plan. The general procedure is to sell certificates on the basis of One Thousand Dollar debenture at maturity, at the rate of approximately $6.25 per month, with the security maturing at periods generally ranging from ten to eleven years. In computing the maturity value the interest rate offered varies from 5½% to 7%, which is included ni the aggregate in determining the maturity value of the security. The character of the security ranges from promissory notes to bonds and in certain cases financial institutions act as trustees, but in others it has been the policy for the company to be the guarantor. These contracts carry a provision that no withdrawals will be permissible prior to periods ranging from 18 months to three years. Furthermore, the provisions of the contract provide that

in the event a subscriber desires to withdraw and terminate his contract that the withdrawal value of said certificate shall be the amount paid in, less penalty ranging from 3½% to 8% of the matured value of the security. The penalty is ordinarily called a loading charge and the companies attempt to justify the same on the grounds that it is one of their methods of procuring funds for selling costs and general operation.

As an example of an aggravated case the Commissioner has a complaint from a subscriber who has paid $260.00 on a $2500.00 contract and 26 payments of $10.00 each and upon his application to withdraw the company offered to return $60.15.

A portion of the Investment Companies in this action were operating in Montana prior to the enactment of the present Investment Act while others have filed with the Commissioner since that time.

The present period of depression has largely changed conditions and wage earners who were the principal subscribers for installment securities find themselves without positions and unable to continue payments on their contracts. The majority of the complainants seem to be of the opinion that they can withdraw their money and when exorbitant penalties are imposed, the resultant effect is apparent.

This hearing resolves itself into two issues—

FIRST, that installment companies shall make settlement with their subscribers at any time after the contract has been in effect one year, upon service of proper notice.

SECOND, that the maximum withdrawal penalty allowed shall not exceed 3½% or $35.00 per thousand, of the face or matured value of the security.

Prior to the hearing the Commissioner served the following notice on each of the Investment Companies included herein:

> "Complaints having been made to the Investment Commissioner that the penalties for withdrawals fixed by investment companies operating in the State of Montana are excessive, unfair, unjust, inequitable and oppressive, to its contributors as provided in Section 4036 of the Revised Codes of Montana, 1921,
>
> THEREFORE, you, and each of you, are hereby notified that this Commission will at 2:00 o'clock P. M. on the twenty-third day of May, 1931, at the office of the Commissioner, at the State Capitol, at Helena, Montana, conduct a hearing relative to promulgating the following rule:
>
> 'In the interests of the investing public, any investment company operating in the State of Montana shall not issue, sell or distribute, any bonds, certificates of indebtedness, collateral trust certificates or any other device whatsoever, that might be deemed a security creating a debtor-creditor relationship, which has a withdrawal privilege, before maturity, that does not provide for withdrawal of installments paid thereon due any time after the first year, if the owner or holder shall have given ninety (90) days notice in writing of his intention to make

such withdrawal and such owner or holder shall be entitled to receive the total amount of all installments paid in, less only a withdrawal penalty not exceeding three and one-half (3½) per cent of the matured or face value of such securities, plus interest compounded annually at the rate at which said securities are guaranteed to mature or represented to pay at maturity; and provided further, that the bond or contract representing such security and the application for the same shall have printed thereon, the amount paid in, the withdrawal or surrender value thereof, and the loan value at the end of each year of its duration.

IT IS FURTHER PROVIDED that none of the above securities as enumerated shall be permitted to be sold in the State of Montana unless there is a withdrawal privilege provided each year beginning with the first year until maturity.'

You and each of you are hereby given an opportunity to appear and present any objections you may have as to the reasonableness of said proposed ruling.

Dated at Helena, Montana, this seventh day of May, 1931.

(Signed) Geo. P. Porter, State Auditor and ex officio Investment Commissioner."

The Commissioner on June 22, 1931, ordered that the rule be adopted to go into effect July 22, 1931.

The Commissioner asserted that he intended to revoke the license of plaintiff to sell its certificates in Montana unless plaintiff complied with the rule, and plaintiff brought a Bill of Complaint in Equity to enjoin the Commissioner from "invoking or purporting to revoke or attempting to revoke plaintiff's permit because of

the failure of plaintiff to comply with said order." (R. p. 9.)

The action was tried before a three judge court on motion for a temporary restraining order. On stipulation after the hearing the case was submitted for final determination (R. p. 31).

Judgment restraining the Commissioner as prayed for was entered and the Commissioner appeals from such final order and decree.

Sawtelle, Circuit Judge, and Pray, District Judge, signed the majority opinion (R. p. 43). Bourquin, District Judge, dissented (R. p. 47).

STATUTES INVOLVED

Statutes involved are as follows: Section 4043 Revised Codes of Montana, 1921:

> "Supervisory control and fees of commissioner. The investment commissioner shall have general supervision and control, as provided by this act, over any and all investment companies and stock-brokers, domestic or foreign, licensed under this act, and all such investment companies or stock-brokers shall be subject to examination by the investment commissioner, or his duly authorized agents or deputies, at any time the investment commissioner may deem it advisable, and in the same manner as is now provided for the examination of state banks. The rights, powers, and privileges of the investment commissioner in connection with such examinations shall be the same as is now provided with reference to the examination of state banks. Such investment company or stock-broker shall pay a fee for each examination made by said investment commissioner, or his deputies or agents, of not to exceed ten dollars for each day or fraction

thereof, plus the actual traveling and hotel expenses of said commissioner, or his agent or deputy, that he is absent from the capitol building for the purpose of making such examination, and the failure or refusal of any investment company or stock-broker to pay such fees upon the demand of the investment commissioner, or his deputy or agent, while making such examination, shall work a forfeiture of his or its right to do business in this state."

Section 4045, Revised Codes of Montana, 1921:

"Revocation of permits and appointment of receiver. Whenever it shall appear to the investment commissioner that the assets of any investment company doing business in this state are impaired to the extent that such assets do not equal its liabilities, or that it is conducting its business in an unsafe, inequitable, or unauthorized manner, or is jeopardizing the interests of its stockholders or the investors in stocks, bonds, or other securities by it offered for sale, or whenever any investment company shall refuse to file any papers, statements, or documents required under this act, or shall refuse to permit an examination by said investment commissioner, or his deputies or agents, as provided in this act, without giving satisfactory reasons therefor, said investment commissioner shall at once cancel its permit, and if he shall deem advisable, shall communicate such facts to the attorney-general, who shall thereupon at once make an investigation, and if the facts as presented to him by the investment commissioner are substantiated, he shall thereupon apply to a court of competent jurisdiction for the appointment of a receiver to take charge of and conclude the business and affairs of such investment company, and if such fact or facts be made to appear, it shall be sufficient evidence to authorize the appointment of a receiver and the making of such orders and

decrees in such cases as equity may require."

Section 4036, Revised Codes of Montana, 1921, provides as follows:

> "It shall be the duty of the investment commsisioner to examine the statements and documents so filed, and if said investment commissioner shall deem it advisable, he shall make or have made a detailed examination, audit or investigation of such investment company's affairs; providing, that such investment company may at its option, in writing, refuse to have such investigation made, in which event said investment commissioner shall reject its application. If he finds that such investment company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business, and proposed contracts contain and provide for a fair, just and equitable plan for the transaction of business, and in his judgment promises a fair return on the stocks, bonds, or other securities by it offered for sale, the investment commission shall issue to such investment company a statement, entitling it to sell such securities in the state of Montana, and reciting that such company has complied with the provisions of this act, that detailed information in regard to the company and its securities is on file in the investment commissioner's office, and that such investment company is permitted to do business in this state; and such statement shall also recite in bold type that the investment commissioner in nowise recommends the securities to be offered for sale by such investment company. Such permit, however, shall be subject to revocation at any time by the investment commissioner for cause to him sufficient. But if said investment commissioner finds that such articles of incorporation or association, charter, constitution, and by-laws, plan of business, or proposed contract contain any provision that is unfair, unjust,

inequitable, or oppressive to any class of contributors, or if he decides from his investigation or examination of its affairs that said investment company is not solvent, or does not intend to do a fair and honest business, or in his judgment does not promise a fair return on the stocks, bonds, or other securities by it offered for sale, then he shall not grant such company a permit as herein provided, and shall notify said company in writing of his decision."

Section 4038 as amended by Chapter 194, Montana Session Laws of 1931:

"Any interested person, who has appeared, co-partnership, association or corporation being dissatisfied with any finding, findings or decision of the commissioner made in accordance with the provisions of this act, may within thirty days from the making thereof, commence an action in any court of competent jurisdiction against said commissioner as defendant, to vacate and set aside said finding, findings or decision, on the ground that the said findings or decision are unjust or unreasonable. The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the district courts of this state and on the hearing the judge of said court may set aside, modify or confirm said findings or decision as the evidence and the rules or equity may require. Appeals may be taken from the decision of the district court to the supreme court by either party in the same manner as is provided by law in other civil actions. Pending any such action, the said findings or decision of said commissioner shall be prima facie evidence that they are just and reasonable and that the facts found are true, and pending any such action the said findings or decision of the commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within

thirty days, the same shall become final and binding.

"Provided, however, that the original application with reference to which an appeal is herein provided for shall not be heard by the investment commissioner until notice of hearing on the same has been published in some newspaper published at the capital city daily, in at least seven issues of such paper, and provided further, that upon such hearing on the original application, any person, co-partnership, association or corporation interested in or opposed to said application may appear."

For possible questions arising we have appended a pamphlet setting out the entire Blue Sky Laws of Montana.

SPECIFICATIONS OF ERRORS

Appellant specifies the following errors which it intends to urge:

I.

The bill of complaint does not state facts sufficient to constitute a valid cause of action in equity or at all (argued last).

II.

The United States District Court for the District of Montana erred in holding that code sections 4043, 4036 and 4045, Revised Codes of Montana, 1921, and Chapter 194 of the Session Laws of 1931 (Blue Sky Laws) are void as violative of the due process clause of the Fourteenth Amendment to the Federal Constitution in that the law, itself, makes no provision for notice or opportunity for hearing by an investment com-

pany whose license the investment commissioner may be threatening to revoke.

III.

The United States District Court for the District of Montana erred in holding that the guaranty of the due process clause of the Fourteenth Amendment to the Federal Constitution is challenged when an order is made by the commissioner, based upon the above mentioned Blue Sky Laws, and with or without actual notice revoking a license or permit, such order to be in effect pending the test of its validity by the court.

IV.

The United States District Court for the District of Montana erred in holding that the Montana Blue Sky statutes and threatened procedure of the defendant are violative of the due process clause of the Fourteenth Amendment to the Federal Constitution in that no rule or standard is provided in such statutes to determine when sufficient cause for revocation of a license exists or when a given business is being conducted in an inequitable manner.

V.

The United States District Court for the District of Montana erred in holding that the Montana Blue Sky statutes violate Section 1 of Article V of the Constitution of Montana in that they require the defendant to exercise legislative power and to, himself, set up a legislative stand-

ard when he undertakes to say whether a certain business is being conducted in an inequitable manner.

VI.

The United States District Court for the District of Montana erred in holding that the Montana Blue Sky laws are violative of the Fourteenth Amendment to the Federal Constitution (privileges and immunities clause) in that the police powers which may be exercised by the legislature of a state do not permit them to regulate the sale of securities or the making of contracts, such regulations to rest in the judgment of the investment commissioner of the state as to whether or not such sales or contracts are equitable (IV., V., and VI. argued together).

VII.

The United States District Court for the District of Montana erred in enjoining the defendant from enforcing his order as against the plaintiff, such order being that it conform to rules promulgated by the commissioner with reference to forfeiture clause and investment contract.

SUMMARY OF ARGUMENT

1.

Where the statute provides for an appeal to the courts as to the reasonableness of the action of an executive officer "due process" does not require the statute to provide for notice and hearing before such executive officer before he

takes action, such as the revocation of a permit.

2.

If such notice is necessary it will be implied.

3.

"Due process" does not require that the legislature set up a definite standard of equity to apply to all cases. If the conditions are within the power of the legislature to impose they may, and can only be, ascertained by the commissioner in such case as this.

4.

Imposition on credulity and ignorance may be prevented as may fraud by active misrepresentation, under the police powers of the state.

5.

The plan of business of the plaintiff as shown in the certificate set up in its Bill of Complaint in requiring the forfeiture shown on the certificate is inequitable and its Bill of Complaint does not state a cause of action in equity.

ARGUMENT

The majority opinion, R. page 33, determined that the Montana statute challenged the due process of law clause of the Fourteenth Amendment:

I.

In that the statute failed to provide for notice to the plaintiff of the promulgation of the order before the revocation of his certificate on his failure to comply with the order.

II.

In that the statute provided no standard by which the commissioner could determine what was "inequitable" in the conduct of a given business.

These holdings have been specified as error (R. p. 48).

DUE PROCESS OF LAW

Montana Revised Codes, Section 4036, in force before plaintiff came into the state authorizes the revocation of a certificate "at any time by the commissioner for cause to him sufficient."

By the provisions of code Section 4045 the commissioner is authorized to cancel a permit "whenever it shall appear to the investment commissioner that it is conducting its business in an unsafe, inequitable or unauthorized manner."

There is no provision in those statutes for notice to the investment company, but Section 4038 as amended by Chapter 194 of the 1931 Session Laws provides for an appeal to the District Court (a court of general jurisdiction), and likewise from the District Court to the Supreme Court from "any finding, findings or decision of the commissioner made in accordance with the provisions of this act and the Blue Sky Law."

The majority opinion reads (R. p. 37):

> "The principal contentions of plaintiff are that Section 4036 Revised Codes of Montana, 1921, which authorizes the revocation of a permit 'at any time by the investment com-

missioner for cause to him sufficient,' and the provision of Section 4045, which authorizes the cancellation of a permit whenever it appears to the investment commissioner that the permittee is conducting its business in an inequitable manner, are in violation of the due process of law clause of the 14th amendment to the Constitution of the United States for failure to provide for notice and opportunity for hearing; and for the further reason that no rule or standard is fixed for determining what is a sufficient cause or when the business is being conducted in an inequitable manner.

"Although in this case a hearing was in fact accorded plaintiff, the Blue Sky Law itself, which was relied upon by the investment commissioner, makes no provision for notice or opportunity to be heard. 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute.' Coe vs. Armour Fertilizer Works, 237 U. S. 413, citing Stewart vs. Palmer, 74 N. Y. 183, 188, 30 A. Rep. 289, involving the validity of a statute assessing the expense of a local improvement upon the land benefited without notice to the owner. According to the weight of authority, although the owner may have been given notice and even a hearing, indicating a desire for fair play on the part of the officer, that is not sufficient to satisfy the constitutional requirement unless the right to such notice and hearing is embodied in the statute. National Automobile Service Corporation vs. Barford, 137 Atl. (Penn.) 601; Garfield vs. U. S. ex rel, Goldsbay, 211 U. S. 249 (not in point); C. M. & St. P. Ry. Co. vs. Board of Railroad Commissioners, 76 Mont. 305; * * *"

The majority opinion (R. p. 39) does hold that the Montana statute above quoted provides for an appeal to the courts of Montana.

It is to be noted that plaintiff appeared at the hearing before the commissioner promulgated the rule in question, filed its protest and took active part in that hearing after notice had been served on plaintiff to appear (R. p. 18).

The question then is: did the provision for appeal to the courts of Montana provide due process of law?

See Section 4038 as amended by Chapter 194, Session Laws of 1931.

> "* * * any interested person who has appeared * * * being dissatisfied with any finding, findings or decision of the commissioner made in accordance with the provisions of this act, may within thirty days from making thereof, commence an action in any court of competent jurisdiction against said commissioner as defendant, to vacate and set aside said finding, findings or decision, on the ground that the said findings or decision are unjust or unreasonable."

In the case of Coe vs. Armour Fertilizer Works, 237 U. S. 413, on which the opinion is founded, an execution had been issued by virtue of a judgment against a corporation but, under the statute, the execution was directed against the property of a stockholder for the amount of his unpaid stock subscription as it showed on the books of the corporation. His property was taken without hearing and he had no appeal to the courts.

It was, of course, held that there was no due process of law.

In Vandalia R. R. v. Public Service Commission, 242 U. S. 255, it was provided by statute that the railroad commission be authorized to investigate the condition and efficiency of headlights in use on locomotives and engines, and to make and enforce against the railroad companies the necessary orders in the installation of such headlights (p. 257). No notice was provided for in the statute. The commission proceeded to make its own investigation. The Court said on page 260:

> "With respect to the question of due process of law, it is unnecessary to determine whether the Fourteenth Amendment requires that state action, legislative in its nature, of the character of the order of the Railroad Commission, shall be preceded by notice and an opportunity for hearing. In the case before us, the Supreme Court of Indiana construed the Act of 1909 as supplemental to the Act of 1905, which, as amended in 1907 (Acts 1907, p. 469, Sec. 6; Burns' Ann. Ind. Stats. 1908, Sec. 5536) gave to any carrier or other party dissatisfied with any order made by the commission a *right to resort to the courts in an action to suspend it or set it aside.* Since the order in question was made after notice and a full hearing, the plaintiff in error had and exercised the right to a judicial review by action at law, we concur in the view of the state court that there has been in this respect no deprivation of property without due process of law."

In Bragg v. Weaver, 251 U. S. 57, by a statute of Virginia it was provided that certain officers engaged in repairing public roads were authorized to take earth for that purpose from adjacent lands, and it then provided for a hearing as to the compensation which the land owners would be entitled to and an appeal to the court.

> "It is true there is no express provision for notice at the inception or during the early stages of the proceedings; and for present purposes it may be assumed that such a requirement is not even implied, although a different view might be admissible. See Paulsen v. Portland, 149 U. S. 30. But the provisions relating to the later stage—the decision by the supervisors—are not silent in respect of notice, but speak in terms easily understood. Clauses 5 and 22 taken together provide that the owner, if dissatisfied with the decision, shall have the right to appeal as in other cases. This presupposes that he will have some knowledge of the decision, and yet neither clause states how the knowledge is to be obtained, or when or how the right of appeal is to be exercised."
>
> "The claim is made that this opportunity comes after the taking, and therefore is too late. But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just. Sweet v. Rechel, 159 U. S. 380, 402, 407; Backus v. Fort Street Union Depot Co., 169 U. S. 557, 568; Williams v. Parker, 188 U. S. 491; Crozier v. Krupp, 224 U. S. 290, 306. And See Branson v. Gee, 25 Oregon 462."

THE REQUIREMENT OF NOTICE IS IMPLIED

Paulsen v. Portland, 149 U. S. 30—opinion (by Mr. Justice Brewer) sets forth the following:

> "Thus, in the case of Gilmore v. Hentig, 33 Kansas 156, it was held thus: 'Where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the costs thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, held, that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same.' See also Cleveland v. Tripp, 13 R. I. 50; Davis v. Lynchburg, 84 Virginia 861; Williams v. Detroit, 2 Michigan 560; Gatch v. Des Moines, 63 Iowa 718; Baltimore & Ohio Railroad v. Pittsburgh, Wheeling &c Railroad, 17 W. Va. 812, 835."

and see Davidson v. New Orleans, 96 U. S. 97 on page 107.

The situation is analogous to the conditions of a burglary—a sheriff on seeing the act may arrest the burglar without warrant or may take his life in certain cases without any more due process than is furnished by the aspects of the case, as they appear to him as a reasonable man. He holds the burglar in jail on indictment or information and deprives him of his liberty pending trial.

See Public Clearing House vs. Coyne, 194 U.

S. 497, on 509. This was a case where the postmaster had refused plaintiff the use of the mails without notice or hearing.

> "Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress. If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government. Even in the recent case of the School of Magnetic Healing v. McAnnulty, 187 U. S. 94, the constitutionality of the law authorizing seizures of this kind by the Postmaster General was assumed, if not actually decided, the only reservation being that the *person injured may apply to the courts for redress in case the Postmaster General has exceeded his authority or his action is palpably wrong.*" (Italics ours.)
>
> "The procedure provided in Section 280 (a) (1) satisfies the requirements of due process because two alternative methods of eventual judicial review are available to the transferee; (a) he may contest his liability by bringing an action, either against the United States or the Collector, to recover the amount paid; or (b) he may avail himself of the provisions for immediate redetermination of the liability by the Board of Tax Appeals, and if dissatisfied, may have a further review by the Circuit Court of Appeals and possibly by this Court on certiorari. Page 597"—Phillips et al., Executors, v. Commissioner of Internal Revenue, 283 U. S. 581, headnote 4.

In support of the majority opinion the Court

cites Garfield vs. U. S. ex rel. Goldsbay, 211 U. S. 249. This case is not in point. The Garfield case was a case where mandamus was allowed where the Secretary of the Interior by his unauthorized and unlawful act and without any semblance of statutory authority had removed the name of an enrolled Indian from the allotment rolls of his tribe and so would have deprived him of his property. It was true his name was removed without notice but the case did not go on that point.

Chicago, Milwaukee etc. Railway Co. v. Board of Railway Commissioners, 76 Mont. 305, is a decision of the Supreme Court of Montana which entirely ignores the principle of the cases above cited that where there is an appeal from the act of a ministerial officer to the Courts as to the *reasonableness* of ministerial action that the due process clause of the Fourteenth Amendment is not challenged.

FAILURE OF DUE PROCESS OF LAW BECAUSE NO STANDARD IS SET UP BY LEGISLATURE

The majority opinion holds:

> "In the instant case the officer is required to exercise legislative power when he sets up a standard and undertakes to say when a business is being conducted in an inequitable manner. Suppose he were directed by the statute to determine when the price of a commodity charged was unreasonable or excessive, or when it was not necessary to provide a reasonable profit, with no direc-

tions or standard to go by; would it not be less complicated than to require him to determine when a business is being conducted in an inequitable manner with no standard in the law as a guide?

"It seems to be generally understood that the main object of the so-called Blue Sky Laws is the prevention of fraud. The police power exercised by the legislature does not go to the extent of regulating or prohibiting the sale of securities or making of contracts based upon the judgment of an investment commissioner or board attempting to insure the public a fair profit on the investment. Nor would the land stand the test if it prohibited such dealing in securities as in the judgment of the commissioner rested upon a plan of organization or conduct of business which was not 'fair.' Ala. & N. O. Trans. Co. vs. Doyle, 210 Fed. 173."

Contrast the language of the opinion with the language in Hall vs. Geiger-Jones, 242 U. S. 551:

"The basis of these contentions is that the law confers arbitrary power upon the commissioner. In considering the contentions we must keep in mind that the law is addressed to a complex situation. Its purpose is, as we have seen, to give a basis for judgment of the securities offered the purchasing public; assure credit where it is deserved and confidence to investment and trading; prevent deception and *save credulity and ignorance from imposition* as far as this can be done by the approved reputation of the seller of the securities and authoritative information.

"It may, however, be said that character establishes itself and neither needs nor can be compelled to accept the stamp of government, and it is asserted that the 'normal investment business of the country' and its 'individual transactions' are not subject to 'executive control,' the broad contention being made that as such business cannot be

prohibited it cannot be regulated. This, indeed, is the basic principle of the opposition to the statute. It is expressed in many ways, and the various provisions of the statute—those that are explicit in direction to the commissioner and those that commit discretion to him—are said to so burden and complicate 'normal business as to make it difficult if not impossible to carry it on in a normal way, if at all.'

"As broadly made, we cannot assent to these propositions. The reason and extent of the law we have indicated and the control to which individual transactions are subjected, and we think both are within the competency of the State. It is to be remembered that the value of securities consists in what they represent, and to determine such value is a complex problem even to the most skillful and informed.

"We have very lately decided a case upon the principle of the power of the State to prevent frauds and impositions. Hutchinson Ice Cream Co. v. Iowa, ante, p. 153. The principle applies as well to securities as to material products, the provisions of the law necessarily varying with the objects. As to material products the purpose may be accomplished by a requirement of inherent purity. The intangibility of securities, they being representatives or purporting to be representatives of something else, of property, it may be, in distant states and countries, schemes of plausible pretensions, requires a difference of provision and the *integrity of the securities can only be assured by the probity of the dealers in them and the information which may be given of them.* This assurance the State has deemed necessary for its welfare to require; and the requirement is not unreasonable or inappropriate. It extends to the general market something of the safeguards that are given to trading upon the exchanges and stock boards of the country, safeguards that experience has adopted as advantageous. In-

convenience may be caused and supervision and surveillance, but this must yield to the public welfare; and against counsel's alarm of consequences, we set the judgment of the state.

"We turn back, therefore, to consider the more specific objections to the law. The basis of them is, as we have seen, the power conferred upon the commissioner, which is asserted to be arbitrary. The objection is somewhat difficult to handle. It centers in the provision that requires the commissioner, as a condition of a license, to 'be satisfied of the good repute in business of such applicant and named agents,' and in the power given him to revoke the license or refuse to renew it upon ascertaining that the licensee 'is of bad business repute; has violated any provision of this act or has engaged, or is about to engage, under favor of such license, in illegitimate business or in fraudulent transactions.' It is especially objected that as to these requirements no standard is given to guide or determine the decision of the commissioner. Therefore, it is contended that the discretion thus vested in the commissioner leaves 'room for the play and action of purely personal and arbitrary power.'

"We are a little surprised that it should be implied that there is anything recondite in a business reputation or its existence as a fact which should require much investigation. If in special cases there may be controversy, those cases the statute takes care of; *an adverse judgment by the commissioner is reviewable by the courts.* Section 6373-8. So also as to the other judgments.

"Besides it is certainly apparent that if the conditions are within the power of the State to impose, they can only be ascertained by an executive officer. Reputation and character are quite tangible attributes, but there can be no legislative definition of them that can automatically attach to or identify individuals possessing them, and necessarily

the aid of some executive agency must be invoked. The contention of appellees would take from government one of its most essential instrumentalities, of which the various national and state commissioners are instances. But the contention may be answered by authority. In Gundling v. Chicago, 177 U. S. 183, an ordinance of the City of Chicago was passed on which required a license of dealers in cigarettes and as a condition of the license that the applicant, if a single individual, all of the members of the firm, if a co-partnership, and any person or persons in charge of the business, if a corporation, should be of good character and reputation, and the duty was delegated to the mayor of the city to determine the existence of the conditions. The ordinance was sustained. To this case may be added Red "C" Oil Manufacturing Co. v. North Carolina, 222 U. S. 380, 394, and cases cited; Mutual Film Corporation v. Industrial Commission of Ohio, 236 U. S. 230; Brazee v. Michigan, 241 U. S. 340, 341. See also Reetz v. Michigan, 188 U. S. 505; Lieberman v. Van De Carr, 199 U. S. 552.

"The discretion of the commissioner is qualified by his duty, and besides, as we have seen, the statute gives judicial review of his action. Pending such review we must accord to the commissioner a proper sense of duty and the presumption that the functions entrusted to him will be executed in the public interest, not wantonly or arbitrarily to deny a license to or take one away from a reputable dealer (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 545); and, as we have said, in cases where there can be a dispute of fact, the statute provides for judicial review, and we see no legal objection to the designation of a particular court for such review."

It is submitted that there is nothing more "recondite" in the proposition as to whether or

not a contract is inequitable than in the proposition as to whether or not a certain concern has a good "business reputation."

The court appears to hold that the due process clause is invaded because the purpose of the statute (to protect against inequitable contracts), is not within the police power of the state although the court does not definitely make this statement in the majority opinion. The opinion states, however:

> "* * * but the Supreme Court held that the purpose of the statute was to protect investors not from financial loss generally but from fraud. Merrick v. N. W. Halsey & Co., 242 U. S. 568."

but we do not so read Merrick v. N. W. Halsey Co.

The court says, speaking of what regulations the state may impose,

> "Besides, it is for the State to judge in such circumstances and the judgment and its execution would have to be palpably arbitrary to justify the interference of the courts."
>
> "It may be that constitutional law must have a more fixed quality than customary law, or, as was said by Mr. Justice Brewer, in Muller v. Oregon, 208 U. S. 412, 420, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action.' This, however, does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments to the organic law. We may feel the difficulties of the new applications which are invoked, the

strength of the contentions and the arguments which support or oppose them, but our surest recourse is in what has been done, and in the pending case we have analogies if not exact examples to guide us. So guided and so informed, we think the statute under review is within the power of the State. It burdens honest business, it is true, but burdens it only that under its forms dishonest business may not be done."

"Engel v. O'Malley, 219 U. S. 128, was not decided because fraud was incidental to the business of banking by individuals or partnerships but because fraud could be practiced in it and that hence it could be licensed. Nor was it decided in Allen v. Riley, 203 U. S. 347, that the transfer of patent rights was of itself illegal or that any particular transfer would be deceptive, but that some transfers might be; and so a statute of Kansas which required any person selling or offering to sell such rights to conform to certain requirements was declared valid. Nor did we hesitate to hold valid the regulation of the business of employment agencies. It was a lawful business and would not in instances be injuriously conducted; but in instances it might be, and because it might be, with injurious consequences, its regulation was provided. This court sustained the regulation and the condition that it was to be enforced according to the legal discretion of a commissioner. Brazee v. Michigan, 241 U. S. 340. See also Brodnax v. Missouri, 219 U. S. 285. Other cases might be cited of similar import."

and see Dillingham vs. McLaughlin, 264 U. S. 370 on page 374.

"Whatever may be one's own opinion about the wisdom of trying to save the ignorant and rash from folly it is a recognized power that is used in many ways."

IT DOES NOT APPEAR ON THE FACE OF THE RECORD THAT THE EVILS DID NOT EXIST IN MONTANA WHICH MAKE THE ENJOINED PROCEDURE AN APPROPRIATE REMEDY

In O'Gorman & Young v. Hartford Insurance Co., 248 U. S. 251:

> "The business of insurance is so far affected with public interest that the State may regulate the rates, and likewise the relations of those engaged in the business.
>
> "A New Jersey statute declaring that rates of insurance against the hazards of fire shall be reasonable, and making it unlawful for a fire insurance company to allow a commission to any person for acting as its local agent respecting such insurance, in excess of that allowed to any of its local agents on such risks in the State, upheld, upon the record in the case as within the power of the State to regulate such rates.
>
> "A state statute, dealing with a subject clearly within the police power, can not be declared void upon the ground that the specific method of regulation prescribed by it is unreasonable in the absence of any factual foundation in the record to overcome the presumption of constitutionality.
>
> "It does not appear upon the face of the record here in question, or from facts of which the Court must take judicial notice, that, in New Jersey, evils do not exist in the business of fire insurance for which the statutory provision is an appropriate remedy. P. 258, 105 N. J. 542, affirmed."

To illustrate: what the commissioner would have done by his proposed order was to fix the limit of forfeiture which an installment invest-

ment company might impose. Certainly such matters as this (what is a reasonable charge for putting the business on the books of the company) have been determined through generations of charges and computations in insurance and like contracts and certainly, as was stated in the Blue Sky cases, if such determination as this cannot be made by the commissioner as the case arises, the legislature is powerless to meet the situation at all.

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AS PLAINTIFF MUST COME IN WITH CLEAN HANDS. HIS CERTIFICATE SET UP IN THE COMPLAINT SHOWS ITS OWN INEQUITY.

> "The complainant is first adjudged and not until he has been found free from taint does equity proceed to determine whether or not he has been wronged."—Fay vs. Lambourne, 214 App. Div. 245, 247; 108 N. Y. S. 864, (Affirmed 186 N. Y. 575. mem. 90 N. E. 1158 mem.)
>
> "Nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence; and where these are wanting, the court is passive and does nothing."—McKnight v. Taylor, 1 How. (U. S.) 161, 168, 11 L. Ed. 86.

Let us examine plaintiff's hands in this action:

> "The Investors Syndicate has approximately ten million in contracts in effect in Montana and for the year 1930 the cash receipts from the state were $309,456.02, represented in 4437 certificates in force at the end of the year. There were 802 certificate

lapsations during the year, representing 18% of the certificates in force and 15% of the total face amount in force."

The following are computations of losses which follow from forfeiture of plaintiff's contract as set out in the exhibit attached to Bill of Complaint, R. p. 10a to 10e:

"a. The loss in equity to be suffered by any investor who found himself unable to continue the installment payments and accepted a cash settlement upon surrender of such certificate prior to maturity, i. e.

1. The loss as measured by the difference between the cash payments plus the accrued interest thereon and the cash to be paid the investor upon surrender of the certificate, the percentage of equity loss being:

x. Under the annual payment plan:

73.1%	at	end	of	18	months
47.6%	"	"	"	2	years
32.9%	"	"	"	3	"
25.1%	"	"	"	4	"
15.1%	"	"	"	5	"
13.0%	"	"	"	6	"
10.1%	"	"	"	7	"
7.2%	"	"	"	8	"
5.5%	"	"	"	9	"

The table is figured on the basis of a $1,000.00 certificate.

LOSS IN EQUITY

Annual Basis ($74.00 *each year in advance*)

Year	Cumulative Cash Payments	Interest 5½ % Comp. Annually	Amount at End of Year	Cash Surrender Values	Loss in Amount:	Equity Percent
1st	$ 74.00	$ 4.07	$ 78.97	$ 42.00	$114.25*	$73.1*
2nd	148.00	8.36	160.43	84.00	76.43	47.6
3rd	222.00	12.89	247.32	166.00	81.32	32.9
4th	296.00	17.67	338.99	254.00	84.99	25.1
5th	370.00	22.71	435.70	370.00	65.70	15.1
6th	444.00	28.03	537.73	468.00	69.73	13.0
7th	518.00	33.65	645.39	580.00	65.38	10.1
8th	592.00	39.57	758.95	704.00	54.95	7.2
9th	666.00	45.81	878.76	830.00	48.76	5.5

*The first cash surrender value allowed is at the end of eighteen months, during which time the accumulated amount is:

On the annual basis $156.25
On the monthly basis 122.15

The business scheme pays about the same rate of interest as is paid on a good standard form of bond investment—5½%—and certainly in a business promising to return that moderate amount of money which causes an unfortunate to lose 73% of the amount that he has paid in at the end of a year if unable to continue with his installments does not highly recommend the promoter of such a scheme in a court of equity.

Note the evidence placed before the commissioner on the hearing as to the order:

> "Mr. P. C. Bulen, President of the Montana States Building and Loan Association, Great Falls, Montana, testified and introduced as an exhibit a contract entered into between C. Everett or Carrie Davis and an investment company, for $10,000.00 installment thrift bond contract. He stated that at the end of 36 months the subscribers had paid in $1260.00 and that the withdrawal value at the end of three years was $625.00, leaving a loading charge, exclusive of accrued dividends and interest, of $624.00. In other words, at the end of 36 months the loss to the subscribers was $624.00."

It is submitted that a complaint showing such an extortionate scheme hidden in a wilderness of print does not commend itself to equity.

CONCLUSION

The decree of the lower court granting an injunction should be reversed and the case remanded with directions to dismiss.

Respectfully submitted,

L. A. FOOT,

Attorney General of the

State of Montana,

T. H. MacDONALD,

Assistant Attorney General

of the State of Montana,

Attorneys for Appellant.

Service of the above and foregoing Appellant's Brief admitted and receipt of a copy thereof acknowledged this.....day of April, 1932.

.....

.....

Attorneys for Appellee.

FILE COPY

No. 627

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE P. PORTER, State Auditor and ex officio Investment Commissioner of the State of Montana, Appellant

vs.

INVESTORS SYNDICATE, a corporation, Appellee.

BRIEF ON REHEARING

L. A. FOOT,
ATTORNEY GENERAL

T. H. MACDONALD,
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR APPELLANT.

MAGGLE PRINTING CO., HELENA, MONT.

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BRIEF ON REHEARING

The sole ground of the motion for rehearing in this case is set forth on page two of the Petition for Rehearing as follows:

> "Section 29 of Article III of the Montana Constitution provides:
>
> > 'The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

> "As this Court has decided that the power sought to be conferred upon the Court by Section 4038 as amended is not judicial but administrative, said section is clearly violative of Section 1 of Article IV of the Montana Constitution."

Petitioner cites In re Weston, 28 Mont., 207, 219. This was a case where the legislature attempted to make it imperative on the Supreme Court to disqualify certain judges of the state on the presentation of an affidavit and it was held:

> "Under Constitution, Article IV, Section 1, the legislature cannot impose upon the supreme court, or its justices, the performance of an act not judicial in its character but *purely* ministerial or executive."

The distinction between the Weston case and this case is that the function to be performed by the courts of Montana in case of an appeal thereto from the decision of the Commissioner is not *purely* legislative or ministerial.

The question involved in the petition for rehearing is: Will the Courts of Montana assume jurisdiction of a case where they must perform legislative as well as judicial functions. The principle has been decided by the Montana Supreme Court in O'Neil vs. Yellowstone Irrigation District, 44 Mont. 506-507.

> "It is undoubtedly true that no case can be found in which a statute imposing purely legis-

lative functions upon courts has been upheld; but, as shown by the cases cited, where the principal power conferred is judicial in character, the fact that the exercise of the power so conferred may incidentally require *the exercise also of legislative or administrative functions* does not impair the validity of the legislation conferring it. The duty to determine the propriety of establishing irrigation districts, resting, as it does, upon public necessity, appertains exclusively to the law-making body. So, also, the mode by which they may be organized must be determined by it. But the ascertainment of the necessity or utility of establishing a particular district, as well as the solution of the question whether the conditions precedent have been complied with, involve judicial functions, the exercise of which is properly left to the courts. It is sufficient to sustain the law if the general power conferred is judicial, though it incidentally requires the performance of legislative and administrative duties. (State vs. Barker, 116 Iowa, 96, 93 Am. Rep. 222, 89 N. W. 204, 57 L. R. A. 244; Sanderlin v. Luken, supra; State ex rel. Matson v. Superior Court, supra)".

Does the appellee and petitioner have the right to a preliminary injunction on appeal to the Courts of Montana.

This question has likewise been decided by the Supreme Court of Montana in State vs. District Court, 53 Mont. 229.

"Has the district court in this class of cases jurisdiction to use the provisional remedy of injunction *in limine* to suspend an order or regulation made and promulgated by the board pending a final determination of the action in which a review of the order is sought."

This case reviewed the action of the railroad commission in establishing certain rates for railroads.

"The board is vested with very extensive powers and duties. Among numerous others it has power, and it is its duty, to establish and promulgate fair and just rates and charges for the transportation of passengers and freight by railroads operating in this state; to prevent extortion and unjust discrimination in this behalf, and to compel all such railroads to provide and maintain train service for both passengers and freight, * * *"

"Section 4384 confers upon the district court of the proper county jurisdiction to review any determination of the board 'fixing any classification, rate, toll, charge, regulation, or order,' or its refusal to make, fix or establish such classification, rate, etc. The action must be commenced by the filing of a complaint in the proper county, and the defendant must be served with summons as in an ordinary action, or with an order of court fixing a reasonable time within which appearance may be made, not less than five days. The issues are made up by answer. If the court finds the order classification, rate, toll, charge, regulation, or

establishing the classification, rate, etc., to be unjust and unreasonable, *it becomes the duty of the board to revise it.* Section 4390 authorizes any railroad deeming a classification, rate, toll, etc., established by the board to have its determination reviewed."

"Section 4390 contains two provisos, viz: 'That until the final decision in any such action the order of the board affecting rates or charges shall be deemed to be final and conclusive: And provided, further, that in any action, hearing or proceeding in any court, the classification, rate, tolls, charges, regulations and orders made, fixed and established by said board shall *prima facie* be deemed to be just, reasonable and proper."

"Though the determinations of the board are *prima facie* just and reasonable, this furnishes no compelling reason why the presumption in their favor *may not be so satisfactorily overcome by evidence on the hearing of the application that the court would be constrained to grant relief,* just as it would in any other case. Inasmuch as the jurisdiction conferred is general, except so far as the legislature has expressly restricted it, we do not think that this court should impose any other restriction. It may be that the legislature should have imposed the same restriction as to all orders. This was for that body to determine, and not for the court. Doubtless it deemed it better to leave the whole matter to the exercise of a wise judicial discretion, anticipating that cases might

arise in which the order complained of would be so clearly oppressive that immediate relief from it would be imperative. It may be assumed that, since the legislature has expressly declared that all the determinations of the board are to be deemed prima facie just and reasonable, the court should exercise its discretion with reserve and caution. This consideration, however, is one affecting the mode of exercising the jurisdiction conferred, and is not pertinent to the inquiry whether the legislature intended to confer it."

The language of the statute in question in this case is Section 4038, as amended by Chapter 194 of the Session Laws of 1931. So far as it pertains to the matter of preliminary injunction is:

> "Pending any such action, the said findings or decision of said commissioner shall be prima facie evidence that they are just and reasonable and that the facts found are true, and pending any such action the said findings or decision of the commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding."

The concluding words of the paragraph "If no action has been brought to set aside said findings or decision within thirty days, the same shall become final and binding" clearly convey the impression that the findings and decision of the commissioner shall not become final and binding for

thirty days, and then only in the event that the action has not been brought. The effect of the words "pending any such action said findings and decision shall be prima facie evidence", have no force as against a preliminary injunction as was decided in the case of State vs. District Court, above quoted from.

L. A. FOOT,
ATTORNEY GENERAL

T. H. MACDONALD,
ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR APPELLANT.

FILE COPY

APR 19 1932

No. 627

IN THE

Supreme Court of the United States

OCTOBER TERM 1931

GEORGE P. PORTER, State Auditor and Ex Officio Investment Commissioner of the State of Montana,

Appellant,

INVESTORS SYNDICATE, a Corporation,

Appellee.

Brief of Appellee

GUNN, RASCH, HALL & GUNN,

Solicitors for Appellee.

M. S. GUNN,
Of Counsel.

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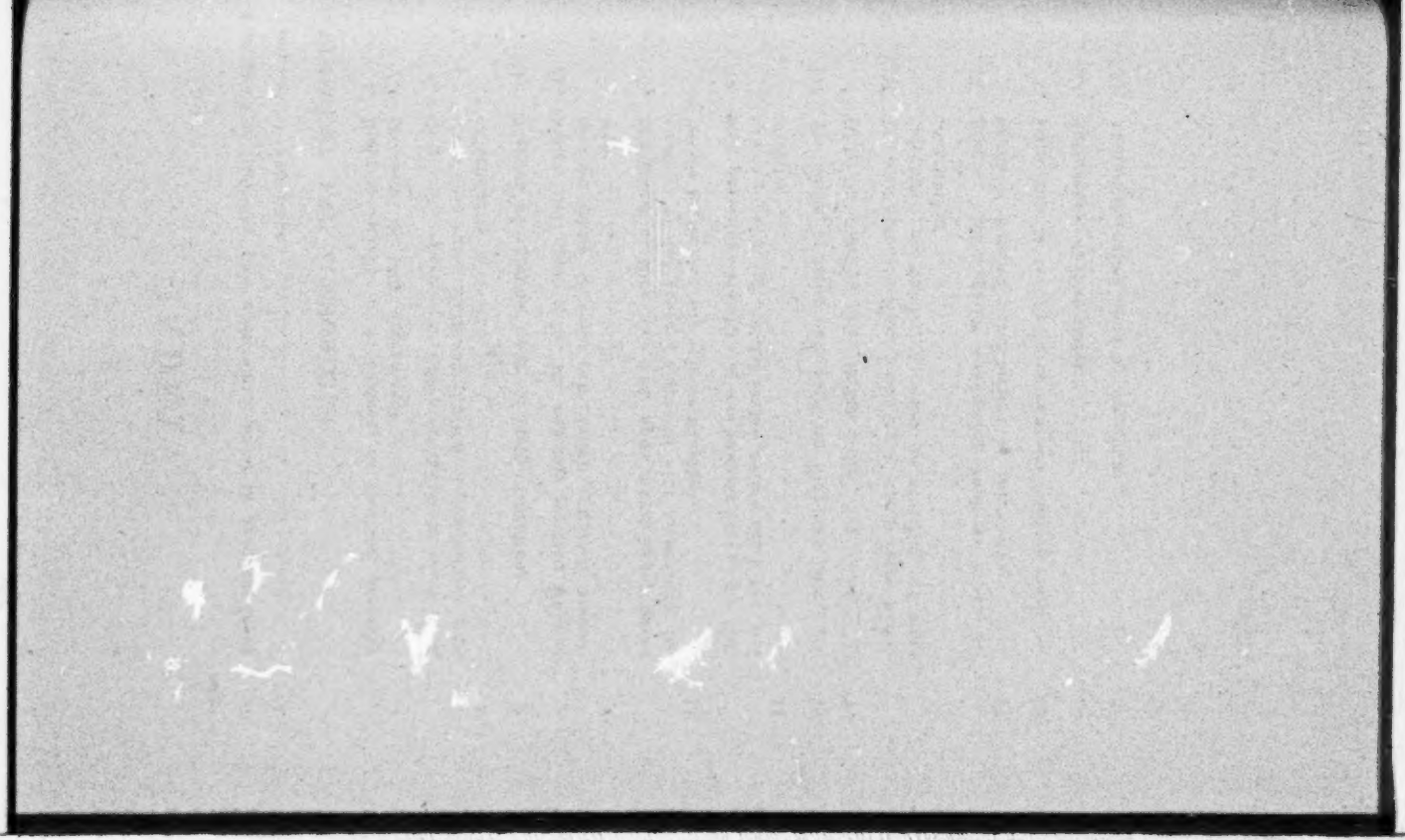


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GEORGE P. PORTER, State Auditor and Ex Officio Investment Commissioner of the State of Montana,

Appellant,

INVESTORS SYNDICATE, a Corporation,

Appellee.

Brief of Appellee

The provisions of the Blue Sky Law of Montana, pursuant to which the rule or order in question was made, and which it is claimed confer the power to revoke appellee's permit to do business in Montana for failure to comply with said order, are as follows:

1. "The Investment Commissioner shall have general supervision and control, as provided by this act over any and all investment companies," etc.
2. "Such permit, however, shall be subject to revocation at any time by the investment commissioner for cause to him sufficient."
3. "Whenever it shall appear to the Investment Commissioner" that any investment company "is con-

ducting its business in an * * * inequitable * * * manner * * * said Investment Commissioner shall at once cancel its permit." (R. 4.)

SUMMARY OF ARGUMENT

1. These provisions are violative of Section 27 of Article III of the Constitution of Montana, which declares that "No person shall be deprived of life, liberty or property without due process of law," and are also violative of the due process of law clause of the 14th Amendment for the reasons:

(a) Notice and opportunity for a hearing are not required.

(b) No rule or standard is provided for determining what shall constitute sufficient cause or what shall constitute conducting a business in an inequitable manner.

(c) Right to a judicial review of the action of the Investment Commissioner in revoking a permit before the revocation becomes effective is not provided.

2. If said provisions are construed to authorize the revocation or cancellation of a permit whenever, in the opinion of the Investment Commissioner, the securities offered for sale do not promise or furnish a fair return, said provisions are violative of both the due process clause of the Montana Constitution and of the 14th Amendment, for the reason that the sale of securities or the making of investment contracts cannot be prohibited upon such ground or for such reason.

3. If said provisions are construed to authorize the

Investment Commissioner to prescribe the terms and provisions of contracts which investment companies may make, such provisions constitute a delegation of legislative power, in violation of Section 1 of Article V of the Montana Constitution, which declares: "The legislative authority of the state shall be vested in a legislative assembly."

4. The finding upon which the order is based (R. 27) that appellee in offering for sale and selling the certificates, with the withdrawal privilege or surrender value therein provided, is conducting its business in an inequitable manner, is unauthorized by the statute.

5. The objections to the withdrawal privilege or surrender value provided in the certificates are without any merit.

ARGUMENT AND AUTHORITIES

All questions, both local and federal, affecting the correctness of the judgment or decision of the lower court are for decision by this court.

David v. Wallace, 257 U. S. 477.

I.

Right to do business property, and right to make contracts liberty, within protection of 14th Amendment.

The right of appellee to do business in the State of

Montana, pursuant to the permit granted, is property within the protection of the due process clause of the 14th Amendment.

In the case of Liggett Co. v. Baldrige, 278 U. S. 105, this court said:

> "That appellant's business is a property right (citing cases), and as such entitled to protection against state legislation in contravention of the Federal Constitution, is, of course, clear. That a corporation is a 'person' within the meaning of the due process and equal protection clauses of the 14th Amendment, and that a foreign corporation permitted to do business in a state may not be subjected to state statutes in conflict with the Federal Constitution, is equally well settled. Kentucky Finance Corp. v. Paramount Auto Exch. Corp., 262 U. S. 544 (Citing cases). And, unless justified as a valid exercise of the police power, the act assailed must be declared unconstitutional because the enforcement thereof will deprive appellant of its property without due process of law."

The protection against state legislation in conflict with the Constitution of the United States applies to statutes in force when the foreign corporation is admitted to do business, as well as to those subsequently enacted.

Power Mfg. Co. v. Saunders, 274 U. S. 490.

The right granted appellee by the permit to make and enter into the contracts in question is liberty protected by the 14th Amendment.

In the case of Locher v. New York, 198 U. S. 45, the court said:

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."

In the case of Coppage v. Kansas, 236 U. S. 1 p. 14, the court said:

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property."

II.

Rule with reference to following state court decisions construing state constitution.

This court, in determining whether a state statute is violative of the constitution of the state, where the constitutionality of the statute has not been determined by the highest court of the state, will apply the state constitution as construed by the Supreme Court of the state.

In the opinion in the case of South Ottawa v. Perkins, 94 U. S. 260, it is said:

"If, therefore, the law in question had never been passed upon by the State Courts, the Courts of the United States would, nevertheless, be bound to give to the Constitution of Illinois the same construction which the State Courts give to it, and to hold a pretended Act of the Legislature void and not a law which the State Courts would hold to be so. Otherwise, we should have the strange spectacle of two different tribunals, having co-ordinate jurisdiction in the same State, differing as to the validity and existence of a statute of that State, without any power to arbitrate between them."

III.

Decision of Supreme Court of State in case of Chicago etc. Ry. Co. v. Board, 76 Mont. 305, controlling.

There is no doubt but that the Supreme Court of Montana would hold provisions of the Blue Sky Law under consideration violative of the Constitution of Montana, in view of the decision of that court in the case of Chicago, etc. Ry. Co. v. Board of Railroad Commissioners, 76 Mont. 305.

In that case the court had under consideration a statute providing as follows:

> "The board of railroad commissioners of the state of Montana shall have power and authority, after such investigation as they may deem necessary, and under such rules and regulations as they may establish with reference thereto, to compel railroads or railways or other companies or corporations operating and holding themselves out to be common carriers in the state of Montana, to extend or construct commercial or industrial spurs from construction lines or tracks at stations or from within station limits." (76 Mont. 312.)

In the opinion, it is said:

> "This statute is attacked by the plaintiff as unconstitutional upon several grounds, the chief of which is that it assumes to delegate legislative powers to the board of railroad commissioners. With this main objection the others are interwoven.
>
> * * * *
>
> Necessarily, the extent of the course of procedure and of the rules of decision are for the determination

of the legislature. We think the correct rule as deduced from the better authorities is that if an Act but authorizes the administrative officer or board to carry out the definitely expressed will of the legislature, although procedural directions and the things to be done are specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power.

But the power must not be so arbitrary in character as to transgress the 'due process clause' of the state or national Constitution. It would be difficult to couch a statute in more general terms than those employed in the one we are considering. Counsel for plaintiff are justified in saying that whether or not a hearing shall be ordered and the carrier afforded an opportunity to introduce testimony relative to the necessity or propriety of an order requiring construction, or whether the investigation shall be ex parte, if left entirely to the board itself. The statute does not undertake, even in the most general terms, to prescribe the conditions under which the board may compel the carrier to construct a spur. It does not provide that the board may issue its order when reasonable public necessity requires it; there is no indicated rule of decision. It does not require as a condition to the making of the order that the board shall give the carrier notice and a hearing; it does not contain even that procedural direction. On the contrary, it assumes to authorize the board only after such investigation as they may deem necessary, and under such rules and regulations as they may establish with reference thereto to compel common carriers to extend and construct commercial or industrial spurs.

• • • •

When we conceive that the board's order to the carrier to construct the spur-track is in effect a taking of property, for it requires the carries to use its property and spend its money (State of Washington ex rel. R. & N. Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 Sup. Ct. Rep. 535 (see(also, Rose's

U. S. Notes)), it would seem clear that an order to the carrier made without notice and without a hearing in effect would deprive the carrier of its property without due process of law. Before a valid order of the character in question can be made we hold that notice and opportunity to be heard is indispensable.

* * * *

Whatever may be the rule generally, where the taking of property is involved extra-official or casual notice of a hearing granted as a matter of favor or discretion cannot be deemed a substantial substitute for the due process of law the Constitution requires.

* * * *

The constitutional validity of a law is to be tested not by what has been done under it, but by what may be done under it.

* * * *

Where property is sought to be taken under an administrative regulation 'the defendant must not be denied the right to show that, as matter of law, the order is so arbitrary, unjust and unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment.'

* * * *

This statute, we think, comes within the denunciation expressed in Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064, where the court said: "The power given to the administrative officers is not confided to their discretion in the legal sense of that term but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

* * * *

For the reasons foregoing, however, the statute cannot be sustained; it is unconstitutional beyond a reasonable doubt."

This decision is in full accord with the decisions of this court.

IV.

Due process of law clause of 14th Amendment requires notice and opportunity for hearing.

In the case of Garfield v. U. S. ex rel Goldsby, 211 U. S. 249, it is said:

> "In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, *it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.*
>
> The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court." (Italics ours.)

In the case of Chicago, M. St. P. R. Co. v. State of Minnesota, 134 U. S. 418, this court said:

> "No hearing is provided for, no summons or notice to the company before the Commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the Commission, in fact, nothing which has the semblance of due process of law."

In Coe v. Armour Fertilizer Works, 237 U. S. 413, it is said:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v.

Palmer, 74 N. Y. 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: "It is not enough that the owners may by chance have notice or that they may as a matter of favor having a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard." The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust & S. B. Co. v. Lexington, 203 U. S. 323, 333, the court, by Mr. Justice Peckham said, with respect to an assessment for back taxes: "If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the tax payer may have received in a particular case that is material, but the question is whether any notice is provided for by the statutes." (citing the New York case.) So, in Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138, the court said: "This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace." In Roller v. Holly, 176 U. S. 398, 409, the court declared: "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." And in Louisville & N. R. Co. v. Central Stock Yards, Co. 212 U. S. 132, 144, it was said: "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such."

In the case of Natl. Automobile Service Corp. v. Barford, 137 At. (Penn.) 601, the court declared unconstitutional a statute of Pennsylvania conferring power upon the Insurance Commissioner of that state, because of failure to provide for notice and a hearing.

V.

These provisions relied upon by the Investment Commissioner are violative of the due process clause of the 14th Amendment because no rule or standard is provided to determine what shall constitute sufficient cause or when or under what circumstances business is being conducted in an inequitable manner.

In the case of Wichita R. R. & L. Co. v. Public Utilities Commission, 260 U. S. 48, the court said:

> "In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action. When, therefore, such an administrative agency is required, as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

In the case of U. S. v. Cohen Grocery Co., 255 U. S. 81, in which the court declared the Act of Congress of August 10, 1910, known as the "Lever Act," unconstitutional, the court said:

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, "That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, "constituted a fixing by Congress of an ascertainable standard of guilt, and

are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary."

In the case of Cline v. Frink Dairy Co., 274 U. S. 445, the court had under consideration and declared unconstitutional an anti-trust statute of Colorado, prohibiting combinations in restraint of trade and to increase or reduce prices, etc. The statute excepted from its operation combinations "the object and purpose of which are to conduct operations at a reasonable profit or to market at reasonable profit these products which cannot otherwise be so marketed." The court in the opinion said:

> "An attempt to enforce the section will be to penalize and punish all combinations in restraint of trade in a commodity when in the judgment of the court and jury they are not necessary to enable those engaged in it to make it reasonably profitable, but not otherwise. Such a basis for judgment of a crime would be more impracticable and complicated than the much simpler question in the L. Cohen Grocery Co. Case, whether a price charged was unreasonable or excessive."

In the case of Adkins v. Children's Hospital, 261 U. S. 525, which involved the constitutionality of an Act of Congress authorizing the fixing of wages in the District of Columbia for women and minors, the court said:

> "The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy. * * * * * * The Board probably found

> it impossible to follow the indefinite standard of the statute, and brought other and different factors into the problem; and this goes far in the direction of demonstrating the fatal uncertainty of the act,—an infirmity which, in our opinion, plainly exists."

In the case of Connally v. General Construction Co., 269 U. S. 385, the court said:

> "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process of law," etc.

The rule announced in the foregoing cases is not confined to criminal statutes.

Small Co. v. Sugar Refining Co., 267 U. S. 233.

Appellant's term of office is four years (Montana Constitution, Sec. 1, Art. VII), and will soon expire. His successor may differ with him as to what constitutes sufficient cause or the conducting of business in an "inequitable" manner. His successor may be of the opinion that the withdrawal privilege is not objectionable, or that the one proposed by appellant is not sufficiently favorable to investors, or that some other provision of the contract which has the approval of appellant is inequitable. Again, the appellant may change his mind as apparently he has done with reference to the certificate in question, as he approved same on February 18, 1930. (R. 32.) No guide or standard is provided. The will of the Investment Commissioner is supreme. It cannot be that such a statute meets the requirements of due process of law.

VI.

Right to Judicial Review of order of Investment Commissioner revoking permit before order becomes effective essential to due process of law.

That the right to a judicial review of an order made by an administrative board or officer, the effect of which is to deprive a party of property, is essential to due process of law, has been often announced by this court.

> Chicago, M. & St. P. P. R. Co. v. State of Minnesota, 134 U. S. 418;
> Wadley S. R. Co. v. Georgia, 235 U. S. 651;
> Oklahoma Operating Co. v. Love, 252 U. S. 331.

While Section 4038, as amended by Chapter 134 of the Laws of Montana of 1931, quoted in appellant's brief at page 12, as construed by the lower court, provides for a judicial review of an order of the Investment Commissioner revoking a permit, it is provided therein that

> "Pending any such action, the said findings or decision of the said Commissioner shall be prima facie evidence that they are just and reasonable, and that the facts found are true, *and pending any such ~~decision~~ action the said findings or decision of the Commissioner shall remain in full force and effect.*" (Italics ours.)

The due process of law clause of the 14th Amendment is a protection against a temporary deprivation of property or a right protected thereby, the same as against a permanent deprivation.

> Prendergast v. New York Tel Co., 262 U. S. 43;
> Love v. Atchison T. & S. F. Ry. Co., (C. C. A.) 185 Fed. 321.

Section 4032 Revised Codes of Montana provides:

> "It shall be unlawful for any investment company or stock-broker, or any representative thereof, to sell, offer for sale, take subscriptions for, or negotiate for the sale in any manner whatsoever, of any stocks, bonds, or other securities of any kind or character, other than those exempted from the provisions hereof by the definitions herein provided, without a permit from the state investment commissioner as hereinafter provided."

Section 4049 provides:

> "Any person or persons, agent or agents, investment company, or stock-broker, who shall violate any of the provisions of this act, shall be deemed guilty of a felony, and, upon conviction thereof, shall be fined for each offense not less than one hundred dollars nor more than ten thousand dollars, or by imprisonment in the state penitentiary for not less than ninety days nor more than one year, or by both such fine and imprisonment."

It is admitted that appellee's right to do business in the State of Montana is of a value largely in excess of $3,000.00. (R. 7.) Appellee has over 20 agents or salesmen in Montana, all of whom have been duly licensed to sell these certificates by the Investment Commissioner. (R. 7.) Appellee paid $500.00 pursuant to Chapter 179 of the Laws of Montana, 1929, for the privilege of continuing to do business. (R. 3.)

It, of course, follows that if appellee's permit is revoked, its agents would, in view of the severe penalty provided in said Section 4049, refuse to further sell, and appellee's business would be destroyed, at least pending a judicial review, and in the event the revocation order

should ultimately be set aside, appellee would have no recourse for the damage sustained because of the suspension of its business or for the injury to its reputation and future business.

VII.

It is not within the legislative power of the state, known as the police power, to regulate or prohibit the sale of securities or the making of investment contracts to protect the public against making investments which may not, in the judgment of the Investment Commissioner, promise or furnish a fair return. The prevention of fraud is the purpose of Blue Sky Laws, and the only purpose which will justify such legislation.

In the case of Ala. & N. O. Trans. Co. v. Doyle, 210 Fed. 173, a statutory court of three judges held the Michigan Blue Sky Law of 1913 unconstitutional, as violative of the due process of law clause of the 14th Amendment. In the opinion, the court said:

> "If the Commission finds that the "sale will, in all probability, result in loss to the purchasers," the sale is prohibited. Unless the security is worth the price asked, the "sale will, in all probability, result in loss to the purchaser." This is the plain meaning of the words. In that event, the Commission has no power to permit the sale; and if, after such a finding, the property is sold to a careful purchaser, who is in no way misled, but buys just what he wants and pays what he thinks it is worth, the seller may be imprisoned for five years; and it would be quite immaterial that the Commissioner was wrong and that the security

sold was in fact worth the price. The element of fraud is wholly eliminated from this part of the statute, and all the dependent police power to protect the citizen against fraud must concurrently disappear. No definition of the police power, which we have seen or which the industry of counsel has found, is broad enough to cover such prohibition, and we are aware of no consideration which even plausibly supports its validity.

Of like effect and subject to like infirmity is the provision forbidding the sale of securities, if the Commission thinks that the company's organization or proposed plan of business is not "fair." Broader and vaguer language could not be chosen. It subjects to the practically uncontrolled discretion of the Commission every issue or general sale of stocks, bonds, or securities hereafter to be made in Michigan. For this and the provision regarding probable loss, we heard upon the argument and we find in the briefs no claim of justification on grounds of public welfare; and we know of none. They deprive plaintiffs of property, and they do not carry the semblance of "due process of law."

After this decision, and in 1915, another Blue Sky Law was enacted in Michigan, which eliminated the grounds of unfairness and possible loss to the purchaser and left only the ground of fraud. The constitutionality of this latter statute was considered by this Court in the case of Merrick v. N. W. Halsey & Co., 242 U. S. 568. It was contended that the purpose of this later statute, like the purpose of the statute declared unconstitutional, was not to prevent fraud but to protect the investing public against financial loss and that this was not permissible. In the opinion the court said:

"Indeed, it is asserted that the statute has not that

purpose, "but rather to prevent financial loss." The assertion is against the declaration of the title of the statute and against the words of its body, and cannot be justified by assigning to it the purpose of the law which it amends; nor can we assent to the contention that such purpose must be inferred from paragraph 8 or other provisions which point, it is said, to the probability of financial loss, not fraud. The act must be considered from its declared purpose and as a whole, not from detached portions which can be easily overwhelmed when assigned a false character."

In the case of Hanley v. Moody, 39 Fed. (2d) 198, a three judge court had under consideration a statute of Texas prohibiting the employment of 11 or more laborers in that state to be transported beyond the boundaries of the state, without giving a bond to the state conditioned to furnish return transportation to each person so employed. The court in the opinion said:

> *"We know of no power in either the national or state legislative bodies to compel an individual citizen to make any particular sort of contract."* (Italics ours.)

In the final analysis, the order in question is but a price-fixing order. The rate of interest and the different sums which appellee obligates itself to pay and loan at different periods are fixed with reference to the payments to be made by the purchaser. The change in the obligation of the appellee, as proposed by this order, in effect, gives the purchaser more for his money in the way of withdrawal and time of withdrawal than the contract provides. It is no different in principle from a statute

which would prohibit an extra charge for a theatre ticket entitling the purchaser to the privilege of a reserved seat. Such legislation is prohibited by the 14th Amendment.

Tyson & Bro. v. Banton, 273 U. S. 418;
Fairmont Creamery Co. v. Minnesota, 274 U. S. I.
Near v. Minnesota ex rel. Olson, 283 U. S. 697;
Williams v. Standard Oil Co., 278 U. S. 235.
Ribnik v. McBride, 277 U. S. 350.

VIII.

If the Blue Sky Law is construed to authorize the Investment Commissioner to prescribe the terms and provisions of contracts which Investment Companies may make, it is a clear delegation of legislative power and violative of the Constitution of Montana.

Section 1 of Article V of the Montana Constitution declares:

> "The legislative authority of the state shall be vested in the legislative assembly."

In the case of State v. Holland, 37 Mont. 393, a statute was declared unconstitutional as a delegation of legislative power. The statute prohibited the using or wearing for certain purposes of the badge or other emblem of the secret orders or societies mentioned by any person not "entitled to use or wear the same under the constitution and by-laws, rules and regulations of such order," etc.

The court in the opinion said:

> "All the powers of government being thus vested in the agencies created for their administration, these agencies cannot lawfully delegate them to any person or collection of persons, or even to the people themselves so far as the Constitution directs or per-

mits. (6 Am. & Eng. Ency. of Law, 2d Ed., 1022; Cooley's Constitutional Limitations, 163.) The legislature is empowered to make, alter and repeal laws. The duty to enforce them falls upon the executive. The courts must perform the office of interpreting and expounding them as the law of the land. 'Under a well-balanced Constitution the legislature can no more delegate its proper function than can the judiciary.'

* * * *

In O'Neil v. American Fire Ins. Co., 166 Pa. 72, 45 Am. St. Rep. 650, 30 Atl. 943, 26 L. R. A. 715, the supreme court of Pennsylvania in discussing a statute providing for the adoption of a standard policy of fire insurance, but leaving the form of the policy to be provided by the secretary of state and filed in his office for reference, well said: 'The elementary books divided a statute into three parts—the declaratory, the directory and the vindicatory. In this statute the legislature furnished the first and third. It delegated the preparation of the second. It declared, in effect, the need of a standard form of policy. It provided punishment for the failure to use such form when provided; but it turned the preparation of the form over to its appointee, and gave him six months in which to do his work and file a copy of it in his office. Whoever might be interested in knowing the directory part of the statute, and understanding what it was he was required to do, had to go beyond the Act of assembly, and inquire of the appointee of the legislature what it was he had filed in his office, of which the people of the commonwealth were bound to take notice at their peril. It will not do to say that the preparation of the form was an unimportant matter of detail, or an act partaking of an executive or administrative character. It was the sole purpose of the Act. It was the only subject named in its title. The enforcement of the standard form of policy was the only object of its penalties. Take out the form prepared by the insurance commissioner, and to be found in

some pigeonhole in his office, and the Act is without meaning or effect. It is completely eviscerated. We do not see how a case could be stated that would show a more complete and unconstitutional surrender of the legislative function to an appointee than that presented by the Act of 1891. By its provisions the legislature says, in effect, to its appointee: 'Prepare just such a policy or contract as you please. We do not care to know what it is. The governor shall have no opportunity to veto it. File it in your office, and we will compel its adoption, whether it is right or wrong, by the punishment of every company, officer, or agent who hesitates to use it.' Upon the same question, see, also, (Citing cases). So here the sole purpose of the legislation was to prevent frauds and abuses perpetrated by the use of certain articles. The legislature declared the prohibition and provided the penalty for its violation, but left it to different societies to supply by declaration in their secret work from time to time, as their varying choice might dictate, the description of the articles themselves. In our opinion this contention of the appellant must be sustained."

See also:

Anderson v. Manchester Fire Ins. Co., 59 Minn. 182;
Nalley v. Home Ins. Co., 157 S. W. (Mo.) 769;
Dowling v. Lancashire Ins. Co., 65 N. W. (Wisc.) 738;
King v. Concordia Fire Ins. Co., 103 N. W. (Mich.) 616.

IX.

Finding that appellee in offering for sale and selling the certificates with the withdrawal privilege or surrender value therein provided is conducting its business in an inequitable manner, is unauthorized by the statute.

The provision authorizing the Investment Commissioner

to revoke a permit "for cause to him sufficient" should, we think, be construed in connection with Section 4045, and that the cause must be one of the grounds for cancellation provided in said Section 4045. One of the grounds for cancellation provided in Section 4045 is the conducting of business in an "inequitable" manner. It is this ground upon which the order in question is based. Appellant as Investment Commissioner found that in selling or offering for sale the certificates with the withdrawal privilege or surrender value provided therein, appellee is conducting its business in an inequitable manner. (R. 29).

The Investment Commissioner must pursuant to the provisions of Section 4036 find, before issuing a permit, that "the proposed contracts contain and provide for a fair, just, and equitable plan for the transaction of business, and in his judgment promises a fair return." As this finding must be made before a permit is issued, the provision of Section 4045, authorizing the cancellation of a permit where the business is conducted in an inequitable manner, can have no reference to the terms and provisions of the contract.

X.

The objections to the withdrawal privilege or surrender value are without merit.

The order is directed to the certificate, the form of which is attached to the complaint as Exhibit "A." While the answer denies that this form of certificate was ap-

proved before the permit was issued, (R. 17), it was stipulated that the form was approved by the Investment Commissioner on February 18th, 1930, (R. 31). The form of certificate introduced as a part of the stipulation was the form approved by the issuance of the permit and the form for which Exhibit "A" to the complaint was substituted. The provision of the certificate to which objection is made is contained in paragraph 11 on the third page of the certificate, and is as follows:

> "11. OPTIONAL SETTLEMENTS PRIOR TO MATURITY. After this Certificate has been in force for any one of the periods shown in the following schedule, exclusive of any period or periods of default, the second party, upon written request and surrender of this Certificate, may elect to receive in cash, per thousand of maturity amount, the sums shown in the following schedule, less any indebtedness secured by this Certificate:
>
18 mos.	2 yrs.	3 yrs.	4 yrs.	5 yrs.	6 yrs.	7 yrs.	8 yrs.	9 yrs.	10 yrs.
$42	$84	$166	$254	$370	$468	$580	$704	$830	$1000"

The certificate provides, in paragraph 2:

> "This Certificate is payable annually in advance, but the second party shall have the right to meet any current year's requirements by monthly payments of $6.50, quarterly payments of $19.30 or semi-annual payments of $38.40 on each $1000 of the maturity amount of this Certificate. The second party shall have the right at any time to change from one method of payment to another."

The certificate provides, in paragraph 10:

> "The Company will loan at any time, upon proper assignment of this Certificate as sole security, a sum

equal to (or less, at the option of the second party) the optional settlement amounts then payable under Paragraph 11 of this Certificate."

In the case of Fidelity Inv. Assn. v. Emerson, 149 N. E. 530, the Supreme Court of Illinois passed on the validity of an order of the Secretary of State cancelling a permit to sell a certificate like the certificate under consideration. The Illinois statute provided that "the Secretary of State shall also have the power at any time, after five days' notice to the seller of securities, when insolvency exists, or when in the opinion of the Secretary of State the further sale of such securities would work or tend to work a fraud upon purchasers thereof, to suspend or cancel permission to sell such securities in this state." The order of cancellation set forth the reasons upon which the order was based, among which was the following:

"(5). In the proposed modified form of contract no withdrawal value is provided for those unable to carry or make the payments until the initial and 12 monthly payments have been made, and the surrender privileges allowed, where the contract has been carried one year, gives the investor less than one-half of the money actually paid by him; i. e., on a contract $180 has been paid in at the end of one year, a cash surrender value of $88 may be taken, but the investor must wait three months to receive this amount."

The court set aside the order and in the opinion said:

"An objection made to the contract is that in its proposed modified form its provides for no withdrawal value until the first year's payment have been made in full, and that the amount of such withdrawal at the end of the first year is less than half the

amount of the first year's payments. These contracts are entered into with reference to a series of regular payments to be made monthly for 126 months. The expense of procuring the contract is incurred at the beginning. It is not unreasonable—at least it is not fraudulent—if it is agreed that if the contract holder desires to withdraw from the contract at the end of the first year, a part or all of the expense to the association of obtaining his contract, which is canceled, should be charged against him in the settlement. There is no public policy of the state which requires that annuity contracts shall provide for their surrender before maturity, and in such case shall require the return to the contract holder of all the payments he has made. The Act which has been previously referred to, which requires in certain cases of annuity contracts that the annuity in case of nonpayment of premium shall automatically be converted into a paid-up annuity, requires such paid-up annuity only after the payment of three full years' premiums, and, so far as this indicates any public policy, it is not inconsistent with the provisions of the plaintiff in error's contracts in regard to paid-up annuities or loan or surrender values."

Attention is directed to the fact that Section 6282 of the Revised Codes of Montana requires life insurance policies to provide that "In the event of default in payment of any premium due on any policy, provided not less than three full years' premiums shall have been paid, there shall be secured to the insured, etc."

It should be noted that the business of appellee is not that of receiving deposits subject to withdrawal from time to time on the order of the depositors. The withdrawal or surrender values are plainly stated in bold type in the contract. The order is not one protecting investors against

loss through insolvency. On the contrary, the order increases the risk of insolvency, as it requires the payment of more money than is now promised. It, in effect, says to appellee and investors that although the purchaser knows exactly what he is buying, and chooses to invest, he cannot do so.

PROVISIONS OF CERTIFICATES

Appellant has stated some provisions incorrectly and has failed to refer to other provisions of the contract which alter the conclusions reached. On page 2 of appellant's brief, it is stated that the certificate "causes the purchaser to forfeit all payments made during the first eighteen months in case he defaults in payments." This is not correct. Appellant's brief has omitted reference to paragraphs 4 and 5. By paragraph 5, if the earning power of the certificate holder is cut off by disability or death, he or his representative may receive the full amount paid in with interest at 4% compounded. By paragraph 4 a certificate holder may reinstate by paying one monthly payment at any time within two years and without the requirement of making up payments missed. Even after that time, by paying $1.00 reissuance charge, and resuming payments, he receives a new certificate of the kind then in force, with credit in full for all previous payments. Under paragraph 7 the contract is assignable and he can sell to one ready to go on with the contract. The contract provides for both permanent and temporary con-

ditions affecting the holder and does not forfeit his payments. The contract does not purport to provide for a savings bank for funds available at any time. It is substantially the endowment policy of insurance companies, with term life protection eliminated. The surrender values are the sums fixed in the event the holder chooses to discontinue.

Likewise, on pages 2 and 3 of appellant's brief a situation is given of an eighteen months' holder paying $148.00 and receiving $42.00. But, under paragraph 10, he can borrow this sum and at the end of six months receive the balance of the second year's cash surrender value, or, he can wait six months and receive the second year's surrender value without borrowing.

The statement in the brief (p. 3) of $370 being paid and receipt of the fourth year surrender value of $254, presupposes that the fifth year payment must first be made before surrender, which is not the fact. The tables near the close of appellant's brief are based upon the same rate of interest for a holder who pays part time and discontinues (of his own volition) as for a holder who continues on for the full ten year period, which is not reasonable.

XI.

Sufficiency of Complaint

Suffice it to say in answer to the contention that appellee does not come into court with "clean hands" that the certificate to which objection was made was approved by appellant on February 18, 1930. (R. 32.)

XII.

Authorities cited in Appellant's Brief and in Dissenting Opinion of District Judge Bourquin.

We deem it unnecessary to review these authorities as they speak for themselves. We feel warranted in saying that they are not applicable to the facts of this case, and make no pronouncements in conflict with the principles which should control, and firmly established by the decisions of this court and of the Supreme Court of Montana. The cases cited for appellant relating to the exercise of the power of eminent domain and the power of taxation are clearly distinguishable, for the reason, as stated in the Phillips case, 283 U. S. 589, "Property rights must yield provisionally to government need."

Respectfully submitted,

GUNN, RASCH, HALL & GUNN,

Solicitors for Appellee.

M. S. GUNN,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 627.—October Term, 1931.

George P. Porter, Auditor, etc., Appellant, *vs.* Investors Syndicate, a Corporation. } Appeal from the District Court for the District of Montana.

[May 23, 1932.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from the decree of a specially constituted district court enjoining the enforcement of an order of the State Auditor, who is *ex officio* Investment Commissioner of Montana. Appellee is a Minnesota corporation engaged in the business of selling investment certificates for which the purchaser pays in instalments and which entitle him at a date therein named to receive their face value. The assumption is that the instalments of principal paid in will be augmented by interest thereon compounded at five and one-half per cent, so that the company will be able to pay the sum named in the certificate before the holder's payments reach that total.

Appellee was licensed in 1930 to do business in Montana pursuant to Chapter 264 Revised Code of 1921, popularly known as the Blue Sky Law, which defines investment companies (§ 4026), forbids their engaging in business without a permit from the state investment commissioner (§ 4032), requires them to apply for such permit and to submit certain information with the application (§ 4033), directs the commissioner to examine the data furnished and to issue or refuse a permit depending upon his determination that the applicant is solvent and its proposed plan of business fair, just and equitable (§4036), and to supervise and from time to time examine the affairs and business of all permittees (§ 4043). Section 4045, which authorizes the revocation of permits, and Section 4038 (as amended by Chap. 194, Session Laws 1931) which gives an action against the commissioner by a party aggrieved by any finding or decision of that officer, are those

which affect the present litigation. They are quoted in the margin.*

Operating under permit appellee has built up a large business in Montana in the sale of its certificates. One form of these provides that in case of default in current payments during the first eighteen months, the purchaser shall forfeit all sums theretofore paid; for default after eighteen months, where payment of $148 on a thousand dollar certificate has been made, the holder is entitled to withdraw $42; after four years and payment of $370, the refund is $254; and after five years he is entitled to repayment, without interest, of the whole amount theretofore paid.

On May 7, 1931, the appellant notified the appellee and others similarly engaged to attend a hearing relative to the proposed adoption of a rule applicable to their business. Appellee appeared by an officer and counsel and stated objections. As a result of the hearing a rule was promulgated June 22, 1931, effective July 22, 1931, forbidding the issuance of certificates extending the privilege of withdrawal before maturity unless they

*4045. Revocation of Permits and Appointment of Receiver. Whenever it shall appear to the investment commissioner that the assets of any investment company doing business in this state are impaired to the extent that such assets do not equal its liabilities, or that it is conducting its business in an unsafe, inequitable, or unauthorized manner, or is jeopardizing the interests of its stockholders or the investors in stocks, bonds, or other securities by it offered for sale, or whenever any investment company shall refuse to file any papers, statements, or documents required under this act, or shall refuse to permit an examination by said investment commissioner, or his deputies or agents, as provided in this act, without giving satisfactory reasons therefor, said investment commissioner shall at once cancel its permit, and if he shall deem advisable, shall communicate such facts to the attorney-general, who shall thereupon at once make an investigation, and if the facts as presented to him by the investment commissioner are substantiated, he shall thereupon apply to a court of competent jurisdiction for the appointment of a receiver to take charge of and conclude the business and affairs of such investment company, and if such fact or facts be made to appear, it shall be sufficient evidence to authorize the appointment of a receiver and the making of such orders and decrees in such cases as equity may require.

Section 4038. Any interested person, who has appeared, co-partnership, association or corporation being dissatisfied with any finding, findings or decision of the Commissioner made in accordance with the provisions of this Act, may within thirty days from the making thereof, commence an action in any court of competent jurisdiction against said Commissioner as de-

should permit withdrawal at any time after the first year of their existence, on ninety days' notice in writing, and thereupon entitle the holder to receive the total amount of all instalments paid in, less a penalty not exceeding three and one-half per cent of the matured or face value of the certificate, plus interest compounded annually, at the rate at which the certificate was guaranteed to mature or represented to pay at maturity; and that the certificate and the application should have printed thereon the amount to be paid in, the withdrawal or surrender value, and the loan value, as of the end of each year after the date of issuance.

The commissioner claimed authority to promulgate this order under that portion of § 4045 which empowers him to revoke the permit of an investment company when it shall appear to him to be "conducting its business in an unsafe, inequitable or unauthorized manner". He asserted his intention to revoke appellee's permit if it failed to obey the rule; whereupon the latter brought action in the District Court to enjoin the appellant from revoking or purporting or attempting to revoke its permit for failure to comply with the order. After the taking of evidence upon a motion for a temporary restraining order the case was by stipulation submitted as upon final hearing. The court granted an injunction, holding that the challenged statute was violative

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fendant, to vacate and set aside said finding, findings or decision, on the ground that the said findings or decision are unjust or unreasonable. The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the district courts of this state and on the hearing the judge of said court may set aside, modify or confirm said findings or decision as the evidence and the rules or equity may require. Appeals may be taken from the decision of the district court to the Supreme Court by either party in the same manner as is provided by law in other civil actions. Pending any such action, the said findings or decision of said Commissioner shall be prima facie evidence that they are just and reasonable and that the facts found are true, and pending any such action the said findings or decision of the Commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding.

Provided, however, that the original application with reference to which an appeal is herein provided for shall not be heard by the Investment Commissioner until notice of hearing on the same has been published in some newspaper published at the capital city daily, in at least seven issues of such paper, and provided further, that upon such hearing on the original application, any person, co-partnership, association or corporation interested in or opposed to said application may appear.

of the due process clause of the Fourteenth Amendment, as lacking any provision for notice or hearing before the revocation of a license, and also because no rule or standard is fixed for the determination of adequate cause for revocation; and further the act constituted a delegation of legislative power contrary to the mandate of Section 1, Article V, of the Constitution of Montana. The appellant assigns these rulings as error, and in addition contends that there was no jurisdiction in a federal equity court to entertain the cause. If this position is sound we need not consider the other alleged errors.

We are of opinion that the appellee failed to exhaust its administrative remedy before applying to the District Court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (*supra*) confers on any interested person dissatisfied with a finding or decision by the commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order and set it aside as unjust or unreasonable, and directs that on the hearing the judge "may set aside, modify or confirm said . . . decision as the evidence and the rules or (*sic*) equity may require". The section confers the right to appeal to the State Supreme Court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely judicial, that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. The duty is laid on the court to examine the evidence presented and either to set aside or to modify or to affirm the commissioner's order, as the proofs may require. The legislative process remains incomplete until the action of that court shall have become final. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 229-230; *Pacific Live Stock Co.* v. *Lewis,* 241 U. S. 440, 444, 450-451. And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428, 438-442. When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22nd of the same year, an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety and legality of the order.

But we are told that the commissioner asserted his intention to enforce the order, and that the statute forbids the state court to afford interlocutory relief. Thus, says the appellee, though trial might result in a decision vacating the commissioner's order, in the interval irreparable harm would have been done by the revocation of the company's permit, and its officers and agents rendered liable to criminal prosecution. Such a state of the law, it is insisted, amounts to a denial of due process to which one confronted with the possible loss of property is not bound to submit, but may at once, if there be the requisite diversity of citizenship and amount in controversy, apply to a federal court for relief. Conceding the correctness of the premises, the conclusion is sound. *Pacific Telephone Co.* v. *Kuykendall*, 265 U. S. 196. The appellant, however, denies the asserted statutory prohibition, and says that the plaintiff in an action attacking a decision by the commissioner may upon a proper showing obtain a stay of its operation.

These opposing views require a construction of the act. Section 4038 as amended provides, so far as applicable:

"The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the district courts of this state. . . . and pending any such action the said findings or decision of the Commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding."

We are cited to no case, nor have we found any, in which the state courts have interpreted or applied the section. The first clause would obviously permit the issuance of an interlocutory injunction upon a proper showing, especially in view of the provisions of the Code of Civil Procedure.* But it is said that the

*§ 9243. Injunction Order—When Granted. An injunction order may be granted in the following cases: 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or, any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff; . . .

See also §§ 9244, 9245, 9246, 9247, 9250, 9251 and 9252, dealing with security to be entered on interlocutory injunction, motions to dissolve the same before trial, etc.

succeeding clause precludes such a remedy. The argument is that the words "pending any such action" mean that during the continuance of the action and until its final decision the commissioner's order must remain in full force and effect. We think, however, that in this phrase the word "pending" has the signifi cance of "until", or while the time is running for bringing such an action. This is one of the recognized meanings of the word, and that it is so used we think is made clear from the sentence immediately following, to the effect that if no action shall be brought to set aside the finding or decision within thirty days it shall become final and binding. When considered together we are of opinion that the two phrases mean that unless and until a person affected brings his action he may not disregard the order. We are persuaded to this view for the reason that it supports the constitutionality of the act, and we are bound if fairly possible to construe the law so as to avoid the conclusion of unconstitutionality. *Bratton* v. *Chandler,* 260 U. S. 110. The construction thus adopted is consistent with the validity of the act, whereas that pressed upon us by the appellee would clearly render it unconstitutional.

Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co.* v. *Lewis,* 241 U. S. 440, 454. But where either the plain provisions of the statute (*Pacific Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 203, 204) or the decisions of the state courts interpreting the act (*Oklahoma Nat. Gas Co.* v. *Russell,* 261 U. S. 290) preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified.

The present case is not one in which the review of the commissioner's action is judicial in character. If it were the authorities cited by appellee which hold that one competent to invoke the jurisdiction of the federal courts is not bound to pursue a judicial review in the state courts would apply. See *Bacon* v. *Public Service Commission,* 232 U. S. 134; *Prendergast* v. *New York Tel. Co.*

262 U. S. 43; *Railroad Commission* v. *Duluth St. Ry Co.*, 273 U. S. 625. As we have seen, under the Montana statute the administrative proceeding is not complete until the court shall have acted in revision and correction of the commissioner's decision. It would be strange indeed if the commissioner's action thus subject to alteration were nevertheless to be made as effective to harm the parties in interest as if no further administrative procedure existed. We can not so read the act in the absence of clear and unambiguous phraseology requiring that course, or of a decision of the state court so construing it.

The decree is reversed and the cause remanded for further proceedings in conformity with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.